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REQUIREMENTS OF THE RATUM ET NON CONSUMMATUM PROCESS *

IN Canon 1119 we find asserted the right of the Holy See to dispense in cases of sacramental unconsummated marriages. This right the Holy See exercises by virtue of that extraordinary power *"ministerialis et vicaria"*,[1] which the Church has received from her Founder over the secondary principles of the Natural Law. With the reorganization of the Roman Congregations under Pius X,[2] the newly created Congregation of the Sacraments became the competent Roman Organ for the consideration of the many details associated with this dispensing power. This Congregation, under the direction of its Prefect, the late Cardinal Lega, published May 7, 1923, in its decree *Catholica Doctrina* Rules or *Regulae*[3] regarding the manner in which the appropriate process for the dispensation should be prepared. These *Regulae* were later supplemented by the Rules of March 27, 1929,[4] regarding pre-

* Paper read at the Annual Meeting of The Canon Law Society of America on November 19, 1944, at the Pennsylvania Hotel, New York, N. Y., by Very Rev. Joseph A. Hickey, O.S.A., J.C.D., Assistant General of the Order of St. Augustine, Consultor and *Commissario Deputato* of the Sacred Congregation of the Sacraments.

1 Cappello. *De Sacramentis*, III, Pars. II, n. 759; Coronata, *Institutiones Juris Canonici*, I, (ed. altera, Taurini: Marietti, 1939), n. 279, 1 °.

2 Pius X, const., *"Sapienti Consilio,"* June 29, 1908; Can. 1962.

3 *Regulae servandae in Processibus super Matrimonio Rato et Non Consummato*, (cited *Reg.*), *AAS*, XV (1923), 389.

4 *AAS*, XXI (1929), 490.

cautions to be taken to prevent a possible fraudulent substitution of persons. The *Regulae* were amplified in some particulars by Art. 206 of the Instruction *Provida Mater Ecclesia,* issued by the same Congregation August 15, 1936,[5] and were modified somewhat by the decree issued by the Holy Office June 12, 1942.[6]

The competence of the Sacred Congregation of Sacraments, which previously had accepted petitions from the non-Catholic [7] as well as the Catholic party to the marriage was limited to marriages between Catholics by the reply of the Holy Office January 27, 1928,[8] in which was asserted its extensive competence in all classes where non-Catholics are involved "quocumque modo ad S. Sedem delatis", and since that date all petitions for dispensation in marriages in which a non-Catholic is a party must be referred to the Holy Office. If one or both parties belong to the Oriental rite, the competent Roman Congregation will be the Sacred Congregation for the Oriental Church and the process will be prepared in accordance with the Instruction issued June 10, 1935, by this Congregation.[9]

Present Authority of Apostolic Delegate

In 1942 His Excellency, the Apostolic Delegate of the United States, received from the Sacred Congregation of Sacraments, at his request, authority to grant to the various Ordinaries of the United States, for the duration of the war, the faculty to institute the canonical process *"super matrimonio rato et non consummato"* without the need of recurring in each instance to the Holy See. This authority was granted in

[5] *AAS,* XXVIII (1936), 313.

[6] *De Quibusdam Cautelis Adhibendis in Causis Matrimonialibus Impotentiae et Inconsummationis.—AAS,* XXXIV (1942), 200; The Jurist, II (1942), 395.

[7] *Reg.* N. 9, § 2.

[8] *AAS,* XX (1928), 75.

[9] *AAS,* XXVII (1935), 333.

the form of a rescript dated July 17, 1942,[10] a copy of which was communicated by the Apostolic Delegate to the various Ordinaries for their guidance.

In the spring of the following year (1943), the Apostolic Delegate sought and obtained by radio under the same conditions, from the Holy Office, the same authority also in the case of *mixed* marriages, that is to say, marriages originally celebrated with the required dispensation between a Catholic and a non-Catholic "*coram ecclesia.*" The text of this concession was not communicated, however, to the various Ordinaries.

When it became known that the Apostolic Delegate had received authority from the Holy Office to grant the faculty to institute the process, it was assumed by many that this permission extended without distinction to instances where a non-Catholic was the petitioner. When it was finally realized that the Apostolic Delegate's authority was limited to cases of *mixed* marriages, it was again assumed, owing to a misunderstanding explainable under the circumstances, that this authority extended only to instances where the Catholic party to the mixed marriage was the petitioner.

It seems well established in practice that the Apostolic Delegate's authority in this matter, as interpreted by him, covers all cases of mixed marriage whether the petition be presented by the Catholic or non-Catholic party to the original marriage.

Considering the general practice of the Holy Office to remit, with appropriate faculties, to the Sacred Congregation of Sacraments for adjudication, cases of mixed marriage without distinction as to petitioner, it is not remarkable that it should have given this authority to the Apostolic Delegate, in view

[10] THE JURIST, III (1943), 154. [What the author says in the text concerning the authority granted by the Holy Office in the form of a radiogram is fortunately explanatory of the statements made in THE JURIST regarding this authority (cf. III [1943], 503, and IV [1944], 624). THE JURIST concurs in the interpretation of the author as set forth here.]

of the general authority he had already received from the Sacred Congregation of Sacraments.

The Faculty to Institute the Process

The faculty to institute the process for the dispensation *"super rato et non consummato"* is usually delegated by the appropriate Roman Congregation in each individual case to the local Ordinary upon his request. Canon 1963, § 2 and the *Regulae* nn. 3-4, describe two instances wherein the law confers this delegation upon the Ordinary. The first contemplates a case tried in the usual way for nullity on the ground of impotence in which the Acts, while failing to establish the existence of the impediment as a cause for nullity, show however that the marriage has not been consummated. The second regards a process unsuccessfully instituted on the basis of alleged nullity for some other impediment (ex. gr. lack of consent, force and fear, etc.), incidental to which process the likelihood of non-consummation has been revealed

In both of these instances the Acts, accompanied by the formal petition for the dispensation signed by one or both parties and completed where necessary in accordance with the norms laid down in the *Regulae,* may be sent directly to Rome. In the use of this faculty many questions of a perplexing nature are often raised regarding details of procedure to be observed in remanding the case from the formal to the *ratum* process. Some of these questions find their answer in Art. 206 of the Instruction *Provida Mater Ecclesia.* Thus in the case for the nullity of the marriage on the ground of impotence when *"ex actis et probatis"* the court decides [11] that there has emerged proof not of impotence but of the non-consummation of the marriage, the court must make the further decision whether or not the proofs adduced are to be deemed complete according to the *Regulae* of May 7, 1923. If the court decides that they are to be considered complete, then upon the petition of one or both parties for the Apostolic dispensation, all

[11] ". . . *tribunalis judicio.*" Art. 206, § 1.

the Acts of the case, together with the opinion of the court itself supported by arguments in law and especially in fact regarding the question of impotence and non-consummation are to be sent to the Sacred Congregation of Sacraments for its judgment in the matter. If deemed incomplete,[12] then upon the petition of one or both parties for the dispensation, they are to be completed according to the *Regulae,* the presiding judge or the auditor acting in the rôle of *judex instructor,* and the Acts fully prepared and accompanied by the *Votum* of the Bishop and the comments of the Defender of the Bond are then to be sent to the Sacred Congregation of the Sacraments.

This latter procedure is likewise to be followed[13] when the case is tried on some ground other than that of impotence and in the judgment of the court[14] the existence of the impediment is unproven but a very probable doubt exists regarding the consummation of the marriage; for since in this case the fact of non-consummation was not part of the original investigation, the Acts of the nullity process will not contain the proofs prepared in accordance with the norms stated in the *Regulae.*

The question may be raised whether the court before deciding to remand the case to the *ratum* process must always await the formal conclusion of the nullity process. Since the stated conditions may at times be found fulfilled even before the completion of the process, particularly where impotence, especially male impotence, is concerned, v. g. after the report of the medical experts has been received, there seems no reason why it should not be remanded at that point. Since the remanding of the case to the *ratum* process, and the judgment regarding its circumstances in accordance with Art. 206 of the *Provida,* imply a formal action on the part of the court, its decisions to this effect obviously should be incorporated in the record.

12 ". . . *collegii judicio.*"—*Ibidem.*

13 Art. 206, § 2.

14 ". . . *collegii judicio.*"—*Ibidem.*

The Petition for the Dispensation

The local Ordinary in making application for the faculty to institute the canonical process *super rato* transmits to the Holy See the petition of one or both parties for the dispensation. This petition or *libellus supplex,* properly signed and dated, should include, as the *Regulae* prescribe,[15] besides the usual elements identifying the petitioner, a full and accurate account of the circumstances of the marriage and the alleged failure to consummate it, as well as a statement of all the causes which might induce the Holy See to grant the dispensation. It should contain, not a detailed but only a summary statement of the pertinent facts, among which should be included the fact and time of separation of the parties, the possible obtainment of a civil divorce and any attempted remarriage, all of which obviously are required for a full and accurate account of the case.

The *Regulae* [16] require that the Ordinary in forwarding the petition should add the *"informatio"* which forms the basis for his recommendation. This *"informatio"*, as the formularies in the Appendix to the *Regulae* [17] imply, should include a copy of the marriage record, testimonial letters attesting the credibility of the petitioner and any documents, certificates, etc., which may have a bearing on the subject. Among these documents will often be found a physician's certificate attesting the state of virginity of the woman petitioner after the separation. As I have stated on another occasion,[18] it is the practice of some Curiae in instances where a woman petitioner contends that she is in complete possession of her physical integrity but has no certificate from a reputable physician to attest this fact, to suggest, before accepting her petition, that

[15] *"Supplex libellus . . . . contineat plenam et accuratam totius facti speciem et causas omnes quae ad obtinendam petitam dispensationem conducere possunt."—Reg.* N. 6, § 1; cf. Appendix I.

[16] *Reg.* N. 9, § 1; Appendix, n. II.

[17] Appendix, II, III, IV.

[18] *"De Processu super Matrimonio rato et non consummato"*—The Jurist, I (1941), 215.

she be examined by a physician and obtain from him an appropriate certificate. While the *Regulae* nowhere suggest it, and although this examination can in no sense be accepted as a substitute for the *"inspectio canonica"*, there is much practical wisdom to recommend the practice. Firstly, by bringing out from the very beginning the full facts, it protects the court against possible surprises revealed by the *"inspectio canonica"*. Secondly, it serves a useful purpose in the protection, so to speak, of the evidence derived through the *"argumentum physicum"*; for in the interval between the sending to Rome of the petition and the formal instruction of the process, many things may happen to affect the condition of the petitioner. Accidents may occur, or serious illness may develop, the treatment of which may require various sorts of remedies or even operations impairing the probative value of the canonical inspection. Finally, for obvious reasons, it will be well to suggest that the identity of the person examined be well established by the physician at the time of the examination. Unless the circumstances of the case indicate its uselessness, the *"informatio"* should include too the results of the efforts made to reconcile the parties.[19] In an appendix to the decree *Catholica Doctrina,* Cardinal Lega stresses the importance of this *"experimentum reconciliationis"* in its relation to the just cause required for the dispensation, and properly so, since it is only when it has become clear that the resumption of married life is impossible that one is justified in recommending a dispensation.

In compiling his *"informatio"* the Ordinary is permitted to conduct an appropriate investigation, but this investigation should be entirely informal with a scrupulous avoidance of the forms of the judicial process, with the interrogation of the parties and witnesses.[20] It goes without saying that the Ordinary is not permitted to cite formally or peremptorily the parties to appear at any preliminary inquiry of this kind or to require that the Petitioner should confirm by formal oath the

[19] *Reg.* N. 10, § 1, § 2.

[20] *Reg.* N. 9, § 1.

truth of the statements contained in the petition, for all this would imply the conduct of a formal judicial inquiry which is reserved exclusively to the Holy See.[21]

In forwarding to Rome the petition with his *"informatio"* and requesting the usual faculties to institute the process, the Ordinary often employs the formulary for that purpose contained in the Appendix[22] of the Rules, not always adverting perhaps to the fact that this is only a suggested form to be varied according to the requirements of the case. Thus when from the petition it might appear that the cause for the failure to consummate the marriage was impotence or something to suggest the possible nullity, it should be made clear in requesting the faculties why the judicial process of nullity has not been or can not be employed. Unless that be done, the Sacred Congregation in answering the request will direct that this process be employed. Certainly it is not logical to request a dispensation from a bond that appearances indicate as probably non-existent. So too it is always advisable to give a proper explanation when the petitioner might appear as the reprehensible cause of the asserted non-consummation since, normally speaking, no petition from the party responsible for the failure to consummate the marriage will be entertained by the Sacred Congregation.

Nature of Process

The process with which we are here concerned is, as the decree *Catholica Doctrina* expressly states, an administrative one, the purpose of which is to compile in the name of the Holy See as complete information as possible on the merits of the dispensation being sought. This being so, the records should show that all possible diligence has been expended by the court in exploring every avenue of useful information, by citing for that purpose all witnesses who may be considered to possess any useful knowledge, and including in the record any important documents which may have a bearing on the case.

[21] *Reg.* N. 2.

[22] *Reg.* Appendix, n. IV.

Again, while all the rules of formal procedure are to be scrupulously observed[23] where possible, their observance is to be subordinated to the main purpose of the inquiry and no practical means of securing any necessary or useful information is to be neglected even if in so doing the normal procedure can not be employed. In this connection may be noted the importance, when the Respondent or any witness possessing useful information is unwilling to give formal testimony at the seat of the tribunal or elsewhere, v. g., through the parish priest, of securing from them, if possible, in an effort to complete the record at least some extra-judicial statement on the merits of the case, for in this way some basis for an understanding of the facts may be made available.

Conditions for Dispensation

Before the dispensation can be granted it must be clearly established in the records, *"juxta normas legis"*, that the marriage in question has in fact remained unconsummated, and that a just cause exists for the dispensation. For the practical purpose of our process, consummation implies "penetrationem etsi partialem vaginae et effusionem veri seminis in ea",[23a] and unless the records disclose that this has not taken place, no successful issue to the process can be anticipated. Hence it is that the marriage must be considered consummated when contraceptive devices have been employed either to eject or sterilize the semen after penetration. The employment of an artificial covering in the use of marriage may prevent a semination and thus effectively frustrate its consummation. It is the usual policy of the Sacred Congregation, however, either because of the difficulty of establishing proper proof or for other reasons, not to grant the dispensation where a penetration of this kind has occurred.

The *Regulae*[24] state that should it become apparent at any

[23] *Reg.* N. 99.

[23a] Cf. Wernz-Vidal, *Jus Canonicum* (ed. 2, Romae, 1928), V, 218; Noldin, I, *De Sexto Praecepto* (ed. 29, Oeniponte, 1937), 64; Cappello, *De Sacramentis* (ed. 4, Romae, 1939), III, 342.

[24] *Reg.* N. 11.

time that the consummation of marriage has been made frustrate by the practice of onanism, the matter should be referred directly to the Sacred Congregation, implying at the same time, that when certain conditions are verified and certain guarantees exist,[25] it may be inclined to entertain favorably the petition. Considering, however, the policy of the Sacred Congregation to which we have just referred, the only instances where onanism has taken place in which favorable action can be anticipated will be those in which no penetration at all has been verified.

The importance of a just cause for the dispensation is obvious, for according to the generally accepted opinion,[26] the *valid* exercise of the dispensing power is dependent upon its existence. The *Regulae* nowhere describe just what this "just" cause may be, because, as Cardinal Lega in the appendix to the decree *Catholica Doctrina* explains, its nature is to be determined by the circumstances existing in each particular case and in this sense should be "proportionaliter gravis". Generally speaking, it will be found in the impossibility of reconciling the parties on the one hand and the need of one or both parties to remarry on the other. Each of these conditions will in turn be explainable because of a number of specific causes which may exist.[27] The increasing importance which the Sacred Congregation attaches to the establishment of a just cause for the dispensation in the process is apparent from its directions, when, in communicating the faculty to the Ordi-

[25] "*Quod si orator significet se criminis nullimode fuisse participem, sed depravatos alterius coniugis mores passum esse, aut, etiamsi fateatur se non esse innoxium, ostendat tamen hodie res eo devenisse ut coniugalis consortii instauratio non sit possibilis, ac sincere sit facti poenitens, et serio promittat se in altero coniugio forte inituro huismodi nefando facinori nullimode operam esse daturum, tunc iudex rem deferat ad H. S. C.*"—*Reg.* N. 11, § 2.

[26] "*. . . ut dispensatio . . . valida sit, duo requiruntur, videlicet matrimonium revere non fuisse consummatum, et iustam exstare causam pro dispensatione concedenda.*"—Card. Lega, in Appendix to decree *Catholica Doctrina;* cf. Cappello, *De Sacramentis,* III, Pars. II, n. 762.

[27] A summary of the principal causes for the dispensation may be found in Cappello, *loco citato;* likewise in Viscont, *De Matrimonio Rato et non consummato,* (Romae, 1928), p. 15.

nary, it enjoins the Defender of the Bond to pay special attention to determine whether the causes adduced in support of the petition are really verified and are to be regarded as sufficiently grave to warrant the desired dispensation.[28]

It is generally agreed that the mere fact that one or both parties desire the dispensation [29] or that appearances indicate that the lack of consummation can be readily established, would not constitute a just cause for the dispensation unless other circumstances were present clearly indicating its necessity.

The Conduct of the Process

The function and responsibility of the Officials in the process, when upon receipt of the required faculty, it has been duly instituted, is to *investigate,* according to the manner prescribed by the *Regulae,* the merits of the Petitioner's claim for the dispensation and then remit the Acts of the inquiry, accompanied by the written opinion of the Bishop, to the Holy See to which alone is reserved the final decision. The authority of the Officials in the process is thus limited to the work of investigation. After the process has begun, it occasionally happens that the weakness of the Petitioner's case may become apparent to the Officials of the court. It may even happen that since strong evidence has been presented tending to show that the marriage was consummated, or that the Petitioner was probably the guilty cause of the asserted non-consummation, little or no likelihood exists that the dispensation will be granted.

It is often asked whether under these circumstances, since to pursue the inquiry would obviously entail a waste both of time and money, the court may decide to abandon the inquiry. To do so, however, would imply, in effect, a final decision regarding the merits of the case, a decision which, as has been

28 "*Ut diligenter percontetur utrum causae, ad petitae gratiae validitatem tutandam allatae, reapse existant et uti graves sufficientesque habendae sint.*"

29 Vide Cappello, *loc. cit.*

stated, is reserved exclusively to the Holy See,[30] and hence the court may not decide on its own authority to abandon the process. It is always possible of course to interrupt the process, in the meanwhile reporting the difficulties to the Sacred Congregation and awaiting from it receipt of further instructions, in keeping with the practice "rem deferendi judicio S. Sedis", when in the discharge of one's commission unusual situations arise. Certainly in the rare case when the Petitioner admits the fact of consummation or the parties confess to collusion in falsely asserting the non-consummation of their marriage, the process may be interrupted immediately, even if the parties refuse to withdraw the petition. Again it is always possible too that the Petitioner, confronted with the fact that no hope exists for the dispensation, may decide to withdraw the petition and thus abandon the process.

Jurata Confessio Conjugum

The first of the proofs or arguments employed in the investigation as listed in the *Regulae*[31] is the *"jurata confessio conjugum"*, or the sworn deposition of the parties attesting the truth of the facts presented. This sworn deposition of the parties constitutes the moral argument and since this is the chief and fundamental proof upon which the process rests, all the other proofs being only confirmatory or corroborative in character, designed to support the allegations of the parties concerned, the court should take every care to make sure that it be clear, definite, and complete, and moreover that the records show that every effort has been expended to clear up any important conflicts that may develop in the testimony of the parties.

The suggested questions found in the formulary of the Appendix,[32] (to be varied and supplemented according to the requirements of each particular case) are designed to bring

[30] *Reg.* N. 1.

[31] *Reg.* N. 20.

[32] *Reg.* Appendix, n. XIX.

out clearly all the circumstances and to evaluate properly the replies of the parties. When the testimony reveals that serious attempts have been made to consummate the marriage, the person interrogated should be requested to describe as accurately as possible the nature of these efforts in the hope of discovering whether any penetration has occurred, for, as we have already stated, upon this the entire question of the asserted non-consummation may depend. The questioning of the woman regarding details of intimate marital relations is an extremely delicate one, particularly when the questioning is to be conducted by ecclesiastics. It is no doubt for this reason and to insure a full observance of the norms of Christian modesty *"servatis plene christianae modestiae regulis"* that the Holy Office in its decree *"De quibusdam cautelis adhibendis in causis matrimonialibus impotentiae et inconsummationis"*, has directed that the questioning of the woman be conducted before the court by a physician *"qui sit religione, moribus, aetate gravis . . . omni exceptione major"* to be appointed by the *Ordinary* himself. This decree of the Holy Office which introduces other changes in the conduct of the process to which we will refer later, suggests many interesting questions. I may here note, however, that it is not within the scope of our present discussion to consider these questions, nor to attempt to explain why the physician assigned to assist the court in the oral examination of the woman should be appointed by the Ordinary himself, whereas the women experts and the physician assisting the court in their examination are to be appointed in the usual way.

Finally, when the testimony of the parties discloses the manifestation by them to others of the failure or inability to exercise conjugal relations, it is important for the purpose of the inquiry to determine whether this manifestation occurred *"tempore non suspecto"* and thus whether there exist any informed witnesses. Hence, when this occurs, the parties should always be requested to state when, and to whom, and under what circumstances this manifestation took place.[34]

[33] *AAS*, XXXIV (1942), 200; The Jurist, II (1942), 395.

[34] *Reg.* N. 60, § 2; *Reg.* N. 42.

Testimonium Septimae Manus

The second proof is the testimony of the so-called *"septimae manus"* witnesses. These include not only the usual witnesses *"de credibilitate"* but likewise those *"de scientia"* or informed witnesses, who may posses any useful information, as, for example, physicians and others who may have received the confidences of the parties *"tempore non suspecto"*. If these latter be not included in the list presented by the parties, they are for obvious reasons always to be cited *"ex officio"*.[35] The *"septimae manus"* witnesses should be chosen preferably from the close relations and intimate friends of the parties, as the various instructions on the subject prescribe,[36] since they perform the function not merely of general character witnesses but, as Canon 1975 notes, of witnesses *"praesertim de veracitate circa rem in controversia deductam"*. Only those in fact, who are linked to the parties by ties of close association and affection may be presumed to be familiar with the circumstances of their conjugal life. Again may be noted the importance, in the case of informed witnesses, of ascertaining when and under what circumstances they received their information, to discover whether this occurred or not *"tempore non suspecto"*.

The Argumentum Physicum

The third proof is the physical one derived from the medical examination of the parties, conducted by the experts appointed by the court. While this argument is only a confirmatory one, its importance should never be underestimated, since at times it is even conclusive in character. The examination of the man is required by the *Regulae* [37] in all instances in which the failure to consummate the marriage is ascribed to impotence

[35] *Reg.* N. 71, § 2.

[36] Reg. N. 58; Can. 1975, § 1; cc. 5, 7, X, *de frigidis et maleficiatis, et impotentia coeundi*, IV, 15; Instr. S. C. C. (22 Aug. 1840)—*Coll. S. C. Prop. Fide*, I, n. 911; Instr. S. C. S. Off. (1858)—*Coll. S. C. Prop. Fide*, I, n. 1153; *Fontes*, n. 4842.

[37] *Reg.* N. 84, § 2.

on his part and the examination of the woman on the other hand has proven inconclusive.

According to the *Regulae* [38] the examination of the woman is usually required except in the obvious cases where its employment would be useless. Two instances are listed [39] in which it may safely be omitted. The first refers to the so-called *"de coarctata"* cases, cases in which the records show that because of a lack of time, place, and opportunity, no consummation was possible.[40] The second refers to the case of a woman who is no longer a virgin.

To these two instances the decree of the Holy Office of June 12, 1942, adds two others. First, when in view of the excellent moral qualities of the parties and witnesses and after weighing well their dispositions of mind as well as all the circumstances of the case and proofs adduced, it is the judgment of the *Ordinary* that the fact of inconsummation has already been fully proven. Second, when the examination of the man fully establishes his inability to consummate marriage.

Considering the conditions required in the two cases described in the decree of the Holy Office, the number of instances in which these may be verified will not perhaps be numerous. I feel sure that few Ordinaries, unless the case be a really outstanding and exceptional one, will be inclined to assume the responsibility of dispensing from the physical examination of the woman on the score that the fact of non-consummation has indeed been fully proven on the basis of the moral evidence. Moreover, in practice, it is usual to make the decision regarding the examination of the woman before all the other proofs have been compiled, though of course there is no rule why it may not be deferred.

[38] *Reg.* N. 84, § 1.

[39] *Reg.* N. 86.

[40] "Si coniuges operam dare rei matrimoniali non potuerunt quia coniuges ne per brevissimum tempus quidem soli fuerunt, vel saltem impossibile eis fuit carnaliter commisceri. Tunc dicitur adesse casus inconsummationis tempore coarctatae."—Viscont, *De Matrimonio Rato et non consummato,* p. 47.

While the various instructions on the subject require that the woman be examined by qualified and experienced midwives,[41] though permitting under certain circumstances that it be done by male physicians, it had become a rather general custom in recent years because of the technical difficulties often involved to prefer male physicians for this work. In the above decree the Holy Office, recalling to mind the clear intent of the provisions contained in Canon 1979, § 2, now insists that the corporal examination of the woman be conducted by *women physicians* or by qualified midwives, and only in the event that these can not be had does it permit the *Ordinary,* with the woman's consent, to appoint for that purpose male physicians, *" moribus et aetate graves "*. The Holy Office apparently wishes thus to call attention to the fact that today many women physicians are available and these, where available, should for obvious reasons of Christian modesty be chosen for this office.

The experts after they have completed the examination of the woman, will embody their findings in a formal report addressed to the court.[42] This report should contain a description of the hymen—its type and present condition—as well as any other pertinent facts. It should report the results of the standard tests usually employed by physicians in this work and express the opinion with its reasons of the expert regarding the physical integrity of the woman examined and the alleged fact of non-consummation. It should be remembered that the aid of the expert is enlisted not so much to ascertain whether the woman examined possesses all the usual signs of virginity but rather to discover whether in the particular case under discussion the alleged fact of non-consummation is confirmed by the examination. For this reason the experts should be acquainted with all the substantial facts in the case, particularly when the records disclose that serious efforts to consummate the marriage have taken place or when

[41] *Reg.* N. 89; Canon 1979, § 2; Instr. S. C. Concilii, a. 1840; Instr. S. C. S. Off., a 1858; Instr. S. C. S. Off., a. 1883, Tit. VI, Art. 5.

[42] *Reg.* N. 93; N. 90, e.

it appears likely that the state of physical integrity may have been impaired by conditions not directly connected with the marriage. If at the time of the examination the experts, as is the usual practice, elicit from the woman examined a recital of the facts regarding her marriage or experiences which might have a bearing on her condition of physical integrity, they will be in a better position to pass judgment upon her assertions. Otherwise this information, if it exist, should be furnished them at the time of their oral examination.

Should any discrepancies develop in the reports of the experts, it is important that these be cleared up, if possible, at their oral examination, and if these discrepancies still remain, should circumstances warrant it, the aid of a *"peritior,"* [43] or third expert should be sought. In any event, the records should disclose that the court has done everything within its power to remove whatever discrepancies or contradictions may exist. After their reports have been received, the experts will appear before the court for an oral examination.[44] In accordance with the decree of the Holy Office already cited, a male physician is to be present at this examination by the court of the women experts and this physician is to propose whatever questions or remarks he may deem opportune under the circumstances. The decree of the Holy Office states that at this examination the court should be assisted by a physician *" in his rebus vere perito ac honestate claro,"* but since it fails to mention by whom he is to be appointed, there appears no reason why he might not be the same one already appointed to assist at the oral examination of the woman.

Conclusion of Process

When all the avenues of possible proof have been canvassed and every reasonable effort has been made to clear up any obscurities, contradictions, or inconsistencies that may appear in the record, and when all the important documents, such as physicians' certificates, copies of divorce proceedings and de-

[43] *Reg.* N. 93, § 2.

[44] *Reg. loc. cit.*

crees, transcripts of hospital records, as well as testimonial letters for the parties and witnesses have been included, the process may be considered complete. The Defender of the Bond will then attach his animadversions or comments.[45] This work of the Defender of the Bond need not include a recital of the facts of the case, nor be pretentious in style. It should include, as its title implies, a series of comments in which should be mentioned all the various difficulties that may be proposed against the granting of the dispensation, with particular reference to the form of the process, the causes for the dispensation, and the possibility of scandal. The instructions communicated to the Ordinary by the Sacred Congregation in transmitting to him the faculty to initiate the process, state that the Defender of the Bond " shall, with wisdom and prudence, present all the arguments, either *in jure* or *in facto,* which militate against the alleged non-consummation and the granting of the dispensation or which may appear to involve contradiction." In no event, however, is he permitted to express any view in support of the merits of the case.[46]

The Bishop will next add his written opinion or *Votum* " pro rei veritate ",[47] in which he will express his views on the merits of the case. Finally, a copy of the original Acts, together with an authentic translation into one of the languages accepted by the Sacred Congregation, will be transmitted to Rome to await decision.

The Vetitum

It occasionally happens that in granting the dispensation the Sacred Congregation imposes a *vetitum* upon the Respondent. This *vetitum* is usually expressed in the following form: "Vetito parti conventae transitu ad novas nuptias inconsulta S. Sede", or "inconsulta Hac Sacra Congregatione."

[45] *Reg.* N. 98, § 1.

[46] Cf. *Letter of Sacred Congregation of Sacraments, Jan. 5, 1937,* apud Bouscaren, *Canon Law Digest,* Vol. II (1943), pp. 541, 542.

[47] *Reg.* N. 98, § 1.

This *vetitum* is usually imposed when the records disclose a probable condition of impotence on the part of the Respondent or when the cause of the alleged non-consummation has been the reprehensible attitude of the Respondent in refusing to permit the proper use of marriage.

As is clear from the circumstances, the *vetitum* is not imposed as a punishment but is intended rather to safeguard the sacredness of marriage and to protect the possible interests of a third party with whom the Respondent might wish to enter marriage. Since it is provisional in form, it seems likely that the Holy See, to which its relaxation is reserved, will be inclined to remove it when it is convinced that its necessity no longer exists. In forwarding to Rome a petition for its relaxation, the Ordinary should add his "*informatio et votum*", in which he will explain in detail the reasons why in his judgment, the petition should be accepted.

THE EMERGENCY POWERS OF CANONS 1043, 1044, AND 1045 AND SOME WAR-TIME CONSIDERATIONS *

THE current universal crisis has induced, not one, but a multitude of emergencies. Those emergencies affect not one, but a multitude of human affairs. As a consequence, mankind, in general, has been compelled to take inventory of his emergency powers, to determine just what they are and how they can best serve him. Since spiritual emergencies, among them matrimonial, are not the least among the effects of the universal crisis, the emergency powers provided by *The Code of Canon Law* assume a compelling character, not normally manifest in commonplace circumstances. Consideration of some of these powers against the background of current conditions is the purpose of this paper.

It must be realized at the outset that adequate appreciation of the utility of these powers in these circumstances requires a factual knowledge of these circumstances not apt to be possessed by one who has time to write about them. This paper can only suggest certain conclusions resulting from reflection upon the literature of Canon Law and the literature of contemporary history, the latter, for the most part, being still in the newspaper stage.

The particular point of this paper is to attempt to determine, as accurately as possible, the specific elements of the emergencies contemplated in the canons under discussion, in an endeavor to answer the simple question, not so simply answered: " WHEN are there verified the emergencies for which

*Paper read at the Regional Meeting of The Canon Law Society of America, January 26, 1944, in New York City, by Rev. Joseph F. Connolly, J.C.L., S.T.L., Professor of Apologetics at St. Joseph's Seminary, Dunwoodie, Yonkers, N. Y.

these powers were provided?" Another equally important, and perhaps more difficult question, the question of mechanics of application, "HOW does one go about the use of these powers?" is not treated here. Time and space defy adequate treatment of both problems. The treatment naturally divides itself into two parts concerned with the two distinct emergencies provided for in these three canons.

Part One

"Urgente mortis periculo....." (c. 1043, 1044)

I. The term, "*periculum mortis,*" designates the emergency warranting the use, according to specification, of the emergency powers of canon 1043, § 4.

Commentators, almost unanimously, define that phrase in the words of D'Annibale: "illud rerum discrimen in quo, cum quis constitutus est, ipsum et superesse et occumbere posse, utrumque est vere graviterque probabile".[1] The Code does not, indeed could not, define the emergency in more specific terms. The actual judgment of the emergency of this character in a particular case is the responsibility of the individual who is the active subject of the powers granted by the canons under consideration.

That danger is to be estimated morally. A reasonably prudent judgment that the danger of death is present satisfies the requirements of the canon on that point. Speaking of the danger of death in relation to Extreme Unction—and the crisis in canons 940 and 1043-1044 is substantially the same, differing only in the character of the cause—Genicot declares that a man can be in probable danger of death, even though the likelihood of recovery is more probable.[2] And Vermeersch observes: "Quare admittunt sufficere *probabile* iudicium seu dubium positivum de morte secutura ex hac infirm-

[1] D'Annibale, *Summula Theologiae Moralis,* (ed. 5, 3 vols., Romae, 1908), I, 38.

[2] Genicot-Salsmans, *Institutiones Theologiae Moralis,* (2 vols., Bruxellis: Alb. DeWit, 1927), II, n. 422.

itate".[3] Interpreting the phrase "*periculum mortis*" in canon 1098, 1°, intimately associated with canons 1043-1044, Vromant points out that death need not be certain or even proximate, but there must be a reasonable danger that any delay may prevent the marriage, through the death of one of the persons, or render it impossible because of the delirious condition of the patient.[4] Survival in a given situation or recovery, even rapid, from a given illness does not affect the dispensation, provided the crisis was prudently judged to be grave at that time. The Code desires only a reasonable judgment of the danger of death at that time. In the formation of that judgment, one may lean upon professional counsel, upon the advice of those present, or even upon the opinion of the one to be dispensed.

The danger of death may affect either of the parties to the contemplated marriage, without regard to the question of who is directly bound by the impediment, or whose is the problem in conscience.[5] Further the character of the cause of danger is not specified by law as in the case of Extreme Unction. It may be external or internal. It must induce a really probable danger of death. Some specific examples used by the authors to illustrate "*periculum mortis*" will be mentioned later.

II. Further asistance towards the determination of some specific situations involving danger of death, especially during times like these, is derived from some war-time utterances of the Holy See.

On May 29, 1915, The Sacred Penitentiary, referring to a previous response of March 18, 1912, replied "Affirmative, iuxta regulas a probatis auctoribus traditas", to the following dubium. "Utrum miles quicumque in statu bellicae convoca-

[3] Vermeersch-Creusen, *Epitome Iuris Canonici*, (ed. 5, Mechliniae-Romae; Dessain, 1934), hereafter cited *Epitome*, II, n. 225.

[4] Vromant, *Ius Missionariorum*, V, *De Matrimonio*, (Louvain: Museum Lessianum, 1931), n. 202.

[5] Resp. S. C. S. Off. (July 1st, 1891)—*Fontes*, n. 1139.

tionis, seu, ut aiunt, *mobilitationis,* constitutus, ipso facto aequiparari possit iis qui versantur in periculo mortis, ita ut a quovis obvio sacerdote possit absolvi".[6] The *dubium* was reworded by the Tribunal in giving the response. The original wording was "ipso facto *versetur* in periculo mortis" instead of "ipso facto aequiparari possit iis etc."

A contemporary response of the Sacred Congregation of the Sacraments may seem, at first sight, to neutralize the effect of the former upon any judgment about danger of death. The Sacred Congregation in this latter instance gave a negative response to a kindred *dubium* proposed by the Cardinal Archbishop of Lyons, which was presented in the following terms: [7] " Whether soldiers *in procinctu,* or as they say, mobilized for war, ought to be considered as constituted in the near danger of death, so that Holy Communion may be administered to them while not fasting." The apparent contradiction on the perilous effects of mobilization is only apparent. The latter response does not deny the perilous effects of mobilization; it does not deny the liceity of administering Viaticum to such men; it *does* deny the liceity of the general custom of administering Holy Communion to such men while they are not fasting. Before the unqualified exemption from fasting for Holy Communion when in danger of death, as found in canon 858, there was more strongly emphasized the obligation of receiving Viaticum fasting, if that could be done without grave inconvenience, whenever the danger of death derived from an external cause.[8] Even now the same counsel is given by some moral theology textbooks.[9] The point of danger of death in mobilization is untouched by the response.

[6] *AAS,* VII, (1915), 282.

[7] *Le Canoniste Contemporain,* XXXVIII (1915), 455.

[8] Cf. Genicot-Salsmans, *Institutiones Theologiae Moralis,* II, n. 202.

[9] Noldin-Schmitt, *Summa Theologiae Moralis,* III, *De Sacramentis,* (22 ed., Oeniponte: Rauch, 1934), n. 153; Aertnys-Damen, *Theologia Moralis,* (11 ed., 2 vols., Taurinorum Augustae: Marietti, 1928), II, n. 159.

A general decree of the Sacred Congregation of the Sacraments given on February 11, 1915, does directly touch upon Viaticum in circumstances of war.[10] "Sacra Congregatio Disciplina Sacramentorum bono animarum consulere cupiens, attentis extraordinariis praesentis belli circumstantiis, iisque perdurantibus ..... declarat et statuit:

1. Milites ad proelium vocatos (*i soldati sul fronte*) admitti posse, *servatis servandis,* ad S. Mensam Eucharisticam per modum Viatici."

The explanation in Italian proves to be a complication, at first sight. "Milites ad proelium vocatos" embraces, as a term, both those "in the line" and those "called up to the line." The Italian companion, as a term, designates, apparently, those in the line. But what need of an interpretation for those most certainly in danger of death, since they are actually in battle territory, and probably within the range of enemy fire? The force of the phrase is to be understood in the light of the circumstances prompting the discussion and the original query about absolution by virtue of mobilization, quoted as the first of these military interpretations. The man who proposed that query, the Bishop of Verdun, explains those circumstances in a letter.[11] The query was submitted in 1912, when war was still only a threat. In the event of war, the men mobilized would report immediately to their battle stations at assigned frontier posts. Where the battle would occur no one knew; but it could begin on any front, and for those men the last chance for absolution would be before departure for their stations. The soldiers with whom the foregoing utterances of the Holy See are concerned seem to be those who "are not in actual danger, will not be for a considerable time to come, in fact may conceivably never be in danger at all, so far as this war is concerned. But they are liable to start any day, and if the principle of the Penitentiary is to hold now as it did in 1912 [it did]—and there seems to be no reason why

[10] *AAS,* VII (1915), p. 97.

[11] *Irish Ecclesiastical Record,* VI (1915), 627.

it should not—they (men mobilized in England in World War I) may be considered as on the same footing as those in actual danger." [12]

A fairly recent reply of the Sacred Penitentiary seems to corroborate that conclusion.[13] Faculty n. 14 of the War Time Faculties [14] grants to all priests the power to absolve in general formula from all sins and censures whatsoever all soldiers "prout in mortis periculo constitutos" on the eve of battle or during the engagement. This *dubium* was submitted: "Quid faciendum si aliquando circumstantiae tales sint ut praevideatur moraliter impossible aut valde difficile fore ut milites turmatim absolvi possint 'imminenti aut commisso proelio'?" The reply: "In praedictis circumstantiis, iuxta Theologiae Moralis principia, licet, *statim ac necessarium iudicabitur,* milites turmatim absolvere." This is not a faculty, but an interpretation, liberal, about the danger of death warranting the use of powers granted, *iure communi,* in canons 882, 892, § 2, and 2252.[15]

III. A formula for interpretation of the term "*periculum mortis*" in canon 1043, § 4, and a norm of practical judgment for particular cases, where professional judgment is not available, especially in the present condition of the world, must be determined. Unfortunately, the men who could elaborate that formula, the canonists about the Holy See, are not available to us. Their academic authority combined with their personal experience in the midst of the great battleground of Europe would make their observations exceptionally interesting and authoritative. But their geographical position also makes them inaccessible. So we must work with our own limited equipment.

[12] *Ibid.*

[13] *AAS,* XXXII (1940), 571.

[14] *AAS,* XXXI (1939), 710.

[15] *Clergy Review,* XXIII (1943), 280 (Mahoney); XVIII (1940), 304 (Mahoney).

All the above utterances of the Holy See were given in connection with matter other than the matter under discussion, matrimony. But the fundamental object of those utterances is one with the fundamental object of this discussion, viz.: —danger of death in relation to sacramental administration.

By virtue of these foregoing pronouncements any priest, in no way approved for confessions, could give sacramental absolution to the men constituted in the circumstances described, as the confessor provided by canon 882. By that very fact this same emergency confessor enjoys the emergency matrimonial powers of canon 1044 as a confessor. Consequently any other dispensing agent mentioned in canon 1043, § 4 could also exercise the same matrimonial powers, since the radical element of consideration in these canons is danger of death and not the power to absolve.

Additional light is cast by these principles. The power of canons 1043-1044 is to be broadly interpreted in accordance with canon 200, § 1.[16] The power of canons 1043-1044, in view of canon 209, can be used validly and licitly, if proportionate reasons are present, in case of a positive and probable doubt of law or fact.[17] If all other specifications of the canon are verified there is certainly realized a grave and proportionate cause.

Against this background, then, the formula necessary and sufficient, to fulfill the demands of the commentators when they declare "periculum mortis moraliter aestimandum est," seems to involve two elements.

The first element is an absolute and physical element, viz., there must be verified in fact a cause that is prudently judged to involve probable danger of death.

The latter element is a relative and moral element, i. e. the danger of death must be considered in relation to the dispens-

[16] Cappello, *Tractatus Canonico-Moralis de Sacramentis,* III, *De Matrimonio,* (ed. 3, Romae: Apud Aedes Universitatis Gregorianae, 1933), nn. 231, 236; hereafter cited *De Matrimonio.*

[17] De Smet, *De Sponsalibus et Matrimonio,* (ed. 4, Brugis: Car. Beyaert, 1927), nn. 790, 810.

ing power and the need for which that emergency power was granted, so that even though the danger itself is not physically present at the moment, yet it is morally present if it be prudently judged that objective conditions may make it impossible to serve the spiritual needs of the individuals concerned, if they are not served now. The idea is aptly stated in the quoted reply of the Sacred Penitentiary; "statim ac necessarium iudicabitur" one may use the power granted for danger of death, once the first element, (the cause), has been verified.

IV. Equipped with a formula, correct or incorrect, for the interpretation of the term "*periculum mortis*" in relation to canons 1043-1044, there still remains the very real problem of application, a particular problem for each individual case and the individual dispensing agent.

A. The judgment on the probably fatal character of a given disease or injury will, as a rule, involve not too much difficulty or concern. In such circumstances, there is generally available medical counsel; and even if that be lacking, there will be verified some signs of the state of health to enable the attending priest to come to a practical decision in the interest of security. But death very frequently does not come through illness or what might be termed haphazard or casual accident, such as traffic accidents, but results from the circumstances of one's occupation, from occupational hazards. And in some occupations death is a much more common phenomenon than in others. One's occupation may certainly kill him. Can one's occupation constitute him, as a member of a class, and *per modum habitus,* in danger of death? The obvious answer is affirmative.

1. A summary glance at one or another textbook, in one or another section, may inspire the too hasty conclusion that all causes productive of danger of death are reducible to three, viz., babies, battles, and bacteria. A more patient and comprehensive examination of these texts in connection with all points concerning danger of death, including the Fifth Com-

mandment, will readily demonstrate that danger of death does extend beyond the three "b's"; and some of the causes are occupational hazards, so that authors do recognize, at least implicitly, the presence of probable danger of death to whole classes of men, and this *per modum habitus.* Some examples of such causes are listed here, both for the sake of themselves and for the sake of the extension of the classifications to be attempted later. The examples retained for this enumeration are those which declare certain *classes* to be in danger of death, either *per modum actus* or *per modum habitus,* so that any member of that class may be the subject of sacramental powers for danger of death, on certain occasions or at any time, depending upon the danger existing *per modum actus vel habitus.*

The examples: One undergoing a grave operation; iron-workers, miners, roofers; occupants of a town under aerial bombardment; women in ectopic gestation and Caesarian operation; travelers on a difficult journey; those in battle; mothers about to deliver their first child, or any child under difficult conditions; criminals condemned to death; soldiers called up for battle; a community during a pestilence or a program of persecution. Concerning travelers by air, there is some disagreement, so that the various references had better be quoted and cited: Cappello [18] and Tummolo-Iorio,[19] in connection with the question of faculties for confessions for aeroplanes, deny that the canon granting maritime faculties applies, but agree that, in existing conditions, flying constituted danger of death, so that canon 882 supplied the solution. Merkelbach [20] considers in danger of death any aviator or nav-

[18] Cappello, *Tractatus Canonico-Moralis de Sacramentis,* II, Pars. 1, *De Poenitentia,* (ed. 2, Taurinorum-Augustae: Marietti, 1929), n. 413.

[19] Iorio, *Compendium Theologiae Moralis iuxta Methodum Petri Gury S. J. ad Normam Codicis Iuris Canonici redactum a Rephaele Tummolo,* (Naples, 1935), II, n. 545.

[20] Merkelbach, *Summa Theologiae Moralis ad Mentem D. Thomae et ad Normam Iuris Novi,* (ed. 3, 3 vols., Parisiis: Typis Desclee, De Brouwer et Soc., 1942), II, n. 352; III, n. 585.

igator making a new journey or exploring new lands; but he holds that an air journey in ordinary circumstances (1942) does *not* constitute danger of death. The editions from which these illustrations were chosen are of the years 1923, 1928, 1933, 1940, 1942.

2. There are still a lot of deaths, and occupational deaths, unaccounted for by the textbooks and their classifications. And it is natural that there should be, since examples will not exhaust the field. The National Safety Council reports for the year 1941 17,000 on-the-job accidental deaths, and for 1942 18,000 on-the-job accidental deaths in War Industries alone, and these, for the most part, are not particularly hazardous occupations. The mortality rate in other manifestly dangerous pursuits must be quite higher. To supplement the information of the textbooks on the causes of danger of death the classifications of the life insurance company were examined.

The life insurance company is vitally concerned with the vitality of its policy holders. To protect its own economic health it carefully measures the physical health and hopes of prospective policy holders. And, among other things, the occupational aspects of health and mortality are carefully examined. A clasification of applicants for policies has been achieved on the basis of the actuarial study of these occupational, and other hazards. We admit that "inferences from statistics about natural and social phenomena can never be more than probable approximations—not laws." [21] But that is all that is required. Noldin requires the following of a truly and soundly probable opinion: a) that it must rest upon a really grave motive of reason or authority; b) that there must be no ecclesiastical definition or certain "*ratio*" opposed to it; c) that its arguments do not lose their probability before the arguments of the opposite opinion. He further adds that there is no need that the degree of probability be computed, provided the opposite lies within the bounds of probability and is *not morally certain.*[22]

21 Coffey, *The Science of Logic,* (1918), II, 290.

22 Noldin-Schmitt, *Summa Theologiae Moralis iuxta Codicem Iuris Canonici,* I, *De Principiis,* (ed. 20, Oeniponte, 1931), n. 237.

Certain limitations of these classifications are recognized. The insurance company is interested in how long a man may live. Canons 1043-1044 are concerned with how soon he is likely to die. On that basis the company excludes those who WILL contract occupational diseases certain to induce an early death. But that individual is not in danger of death till he contracts the disease. Therefore, there have been selected here only those occupations in which the only apparent cause of early death is from occupational accident, *per se* fatal, so that such a person is constantly in danger of death from his work.

The professional reading manual for 1943 of a nationally known life insurance company under the general heading "Occupational Ratings" introduced a general rubric which contained the following: "In classifying, occupations which do not involve ABNORMAL health or accident hazard and are 1st class risks in every respect generally are omitted." To get a mention in the book at all, then, an occupation must involve some abnormal risk. There are four classes. The most extreme class embraces those occupations to whose members the company will simply "DECLINE" to issue a policy. Such forlorn individuals certainly seem to be in habitual danger of death. These are the groups:

1. Aviation Industry:
   Lighter-than-aircraft crews
   Glider pilots
   Test pilots
   Aerial photographers
   Skywriters
   N. B. All others in the Aviation Industry are unclassified, so that individual inquiry is necessary in each case.
2. Automobile drivers—racing and speed-testing
3. Caisson works on dams and tunnels
4. Divers
5. Submarine workers
6. In crucible steel plants "pullers-out" (pot-lifters)

7. Seamen (the *iter periculosum* is well defined)
   Whole crew on "tramps", or ocean-going steamers of less than 3000 gross tons, or on Great Lake steamers of less than 2000 gross tons.
   Masters and crews of powerless ocean-going vessels.
   Crews of ocean-going and Great Lake SAILING vessels of more than 150 gross tons.
   Masters AND crews of same type under 150 gross tons.
8. Shot-firers in the mining industry
9. Drillers and shooters using explosives in oil wells
10. Steeplejacks

The next class below the ultimate "DECLINE" is "C" class, thus described: "'C' rates apply to the more hazardous occupations." From that rubric alone nothing seems to be available concerning danger of death. But the following list of "C" occupations embraces several of the illustrations used by authors. A plausible argument might be offered for all others in the group on the basis of their association with imperiled companions honored by textbook mention. Especially is that true when one thinks of the circumstances of a "roofer" in the average European community as contrasted with the occupational hazards of some of our routine jobs on sky-scrapers, e. g., window-cleaners. Keeping in mind the text-book examples, one may recognize in this list some old friends with new names.

1. Steel bridge builders, including builders, painters, structural iron workers, carpenters and foremen.
2. General construction—structural iron workers, build ing wreckers.
3. Electric workers—linemen, cable splicers, "trouble hunters".
4. Deep-sea fishermen.
5. Officers and crew in schooners.
6. Lumber trades—raftsmen, rivermen, riggers, topmen (riggers, etc., in ship-building also).

7. Seamen—sailors, deckhands, oilers, mechanics, cooks, waiters on ocean steamers of regular lines or on Great Lake steamers of over 3000 gross tons; officers and crews of ocean-going tugs; officers of ocean-going and Great Lake sailing vessels of 150 or more gross tons.
8. Railroads, regular, elevated and subway—a whole series of carefully classified employees, nearly all of whom are engaged in yard or track work.
9. Rig and derrick builders in the oil industry (shipping).
10. Window-cleaners.

A third group of occupations referred to in this general section of "Occupational Ratings" is a group, not included in any of the four regular classes, but set apart with the injunction that individual inquiry be made in each case. The zealous pastor might take the company's advice. These are the occupations which should be examined individually:

1. Tunnel workers, except caisson workers.
2. Manufacturers and handlers of explosives.
3. Keepers and crews of off-shore lights, ship or fixed.

The classifications of the insurance company offering aid to the determination of the probable danger of death may be terminated with this observation. It is not intended or expected that anyone retain a memory of the classifications. Rather, the point is that danger of death is not only in textbooks, but where one finds it. And vitally interested agencies have found it rather widespread about us. The emergency of canons 1043-1044 is a far more commonplace thing in a highly industrialized era and area. There may be many opportunities to solve a spiritual problem by use of these canons in cases of occupational hazards, when the normal procedure, always preferable on all counts, would be too slow.

3. Military conditions obviously involve many lethal perils. Just what these are is not always quite so obvious, especially to the civilian who stands, patiently, waiting to be let in on the "military secret". Some points that might be debatable may

be made here. Any service flying can prudently be considered to involve danger of death. The statements from authors and the caution of the insurance companies, these two things alone would give one sufficient evidence for such a prudent judgment. Merkelbach joins Cappello and Tummolo-Iorio, since his reservation " in ordinariis adjunctis ", is no longer realized in the case of any military flying, combat, training, transport or ferrying. The prudence of such a judgment is confirmed by the OWI release in the newspapers of Sunday, January 16, 1944. That release admitted that "air deaths in ARMY TRAINING" are up 88% over peace-time training figures. During this war-time training 20 pilots in every 1000 trainees are killed. This casualty rate is the number of persons killed, not the number of crashes.

Another point that seems to be prudently admitted is that the danger of death is present, physically, once a soldier gets aboard the transport. Any journey eastward to the War area is a perilous journey, regardless of government announcements on the efficiency of convoys, etc. Any time a vessel is equipped for and resigned to fighting its way to port with gunpowder, the journey is perilous indeed. By that token all ocean travel eastward is certainly hazardous. Travel westward from California doesn't seem to involve the same actual hazards. But the ships are equipped physically for a hazardous journey; so should the men be equipped spiritually. This point extends to all who cross by sea, civilian or serviceman, in any capacity, with the possible exception of refugee ships enjoying "safe conduct."

There are probably many more phases of military life and duty involving probable danger of death. Only one acquainted with military matters could speak of them with authority. But considering the many military details that parallel hazardous civilian occupations, it seems that one could readily admit the existence of many emergencies in which canons 1043-1044 could be rightly employed.

B. The second element needed is the relative moral element, i. e.,even though the danger is physically absent AS YET, it is

morally present if there is the likelihood of objective circumstances preventing the use of the emergency power—or the equivalent—if it is not used now. Two examples will illustrate the point. Once a serviceman has been "alerted" for overseas duty, he is morally in danger of death. Death itself begins to threaten at the transport. His liberty before sailing and sailing itself are equally uncertain. Given a chance to serve his spiritual needs by canons 1043-1044, the chance may be grasped eagerly, if no other means is at hand. Another example is found in civilian life. Steel workers and iron workers *et al.* are admitted to be engaged in very hazardous work. Moralist and actuarial expert agree. When a man leaves his home to travel any distance and to remain away for any time doing such hazardous work, there is present probable danger of death. It is probable, only probable that he will not return to his family. In such a case, the natural processes being found inadequate, canons 1043-1044 could be utilized to regulate the spiritual ills of the domestic scene, if such exist. As in the case of the soldier, death physically threatens when he gets to the danger area. But the woman concerned will not be there and death may well step in to prevent another meeting of man and woman for revalidation of marriage. Such is an emergency, which, in its fundamental aspects, canons 1043-1044 were intended to serve.

Part Two

> ". . . . . quoties impedimentum detegatur, cum jam omnia sunt parata ad nuptias, nec matrimonium, sine probabili gravis mali periculo, differi possit . . . . ." (canon 1045,§ 1).

I. The various interpretations of the emergency envisaged by this canon are fundamentally reducible to three, each of which will be considered here.

A. The most liberal interpretation is that advanced by *Il Monitore Ecclesiastico.*[1] The practical conclusion of this

[1] *Il Monitore Ecclesiastico,* VII (1925), 297.

interpretation indicated that the Ordinary, by virtue of canon 1045, § 1, could dispense, if, from the moment at which he discovered the impediment to the date fixed for the marriage, there was not time to obtain the dispensation from Rome, provided the marriage could not be postponed without fear of grave harm. Briefly, every POSSIBLE emergency, outside of danger of death, in relation to marriage, was covered by Canon 1045. The phrase chosen for expression was merely typical—"cum jam omnia sunt parata ad nuptias"—and was chosen because it was the phrase used to describe the best known emergency outside of danger of death, the "*casus perplexus*". The reason for this interpretation can be thus summarized. As the legislator has desired to provide, in canons 1043 and 1044 for ALL cases in danger of death, so has he desired to provide, in canon 1045, for ALL OTHER cases of emergency. Otherwise the law would be incomplete, insufficient and contradictory. Incomplete and insufficient because there would be one class of marriage for which a dispensation would be urgent, but for which dispensing power would not have been provided; contradictory because some cases would at the same time be urgent and not urgent, since the dispensation would, at the same time, be necessary and impossible.

The necessary commentary on this interpretation seems to be this. As far as literal exegesis of the canon is concerned the interpretation had no probability, and did not pretend to have any. The argument was based on the benevolent will of the legislator, and the necessity of the said interpretation to consider that will efficacious in matters matrimonial. But it is no longer necessary to make canons 1043-1045 exactly coextensive with the will of the legislator in the matter of dispensing powers granted subordinates of the Holy See for matrimonial emergencies. Canon 81 provides a dispensing power broader, in some respects, than the power of canon 1045. Consequently, admitting the premise of this interpretation, viz., the benevolent will of the legislator to provide adequately for matrimonial emergencies, one need not and can not hold that such provisions are exhausted by canons 1043-1045. These

canons do provide power to meet the two PRINCIPAL emergencies cited by pre-Code authors as examples. But canon 81 equips the Ordinary, but no lesser persons, to meet other emergencies perhaps less commonplace. "Cum jam omnia sunt parata" does have some restricted significance and extent.

For proof of the fact that canon 81 extends to cases beyond the limitations of canon 1045, it is sufficient to point to the response of the Code Commission,[2] affirming that by virtue of canon 81 collated with canon 1045, the Ordinary could dispense from matrimonial impediments, within the limits of the same canon 81, even though everything was not yet in readiness for the wedding. The point involved in this authentic interpretation had already been emphasized in a Rotal decision,[3] which confirmed a prior decision of the same Tribunal, but on this different basis, that if the conditions of canon 1045 were not fulfilled, the dispensation would still be valid according to the provisions of canon 81, provided the conditions specified in this latter canon were verified. The same doctrine had long been maintained by some commentators. The necessary conclusion of such doctrine is that there are three classes of matrimonial emergency provided for by *The Code of Canon Law,* each distinct from the other, viz., "in periculo mortis", "cum jam omnia sunt parata" and "in periculo gravis damni". The specifications of the second emergency will have to be determined later.

B. A second interpretation is proposed by De Smet.[4] This opinion holds that canon 1045 is the application and the determination, and as such TAXATIVE, of the general principle of canon 81 as applied to matrimonial dispensations, so that the power to dispense from matrimonial impediments cannot be extended beyond the limits of canons 1043-1045. What has been said of the first interpretation, concerning the relations of canon 81 and canon 1045, obtains in this case also.

[2] *AAS,* XXXIV (1942), 241.

[3] *S. R. Rotae Dec.,* XVIII (1926), 318.

[4] De Smet, *De Sponsalibus et Matrimonio,* n. 763.

Furthermore, according to this opinion, the restrictions contained in the tenor of this canon must be strictly observed. The determination of the conditions to be verified for the valid application of the powers contained in canon 1045 will be considered later.

C. A third opinion requiring separate comment is that of Cappello. But adequate comment is possible only by examining both the ultimate edition [5] and the penultimate edition [6] of that author's treatise on matrimony. The earlier edition leaves in one's mind certain doubts as to the exact position of the author on the point at issue. In that edition the following quotations present some difficulty. "Praescriptum canonis 1045 ita est intelligendum, ut respiciat omnes casus *gravis* et *urgentis necessitatis,* qui occurrere possunt *extra mortis periculum.* Nam sapientissimus optimusque Legislator provide consulere voluit in Codice omnibus et singulis casibus verae et urgentis necessitatis. Hoc in genere atque universim traditur in can. 81; in specie quoad irregularitates in can. 990, § 2, quoad absolutionem a peccatis et censuris in can 882, 2252 et 2254.

Idem dicas de matrimonio. In can. 1043 consideratur gravis et urgens necessitas, quae habetur *in periculo* mortis; in can. 1045, attenditur gravis et urgens necessitas *extra periculum mortis*".[7] A striking similarity to the two opinions already presented, in terms of the relationship of canon 81 and canon 1045, is suggested by the quotation. And yet another look at the same edition belies the similarity. "Can. 1045, § 1 et 2 non aufert potestatem concessam in can. 81, nec illam quodammodo absorbet. Sane canon iste sub aliquo respectu latius patet, quam ille."[8] Cappello seems to eliminate all ambiguity of position in the ultimate edition. "Cum verba can. 1045 sint intelligenda eo sensu, quem supra exposuimus,

[5] Cappello, *De Matrimonio* (ed. 4, 1939).

[6] Cappello, *De Matrimonio* (ed. 3, 1933).

[7] *De Matrimonio* (ed. 3, 1933), n. 233, 20.

[8] *De Matrimonio* (ed. 3, 1933), n. 234, 30.

concludendum, facultatem dispensandi concessam a can. 81 totam contineri penitusque absorberi, ad impedimenta matrimonialia quod spectat, a can. 1045 ".[9] Leaving to the reader a more complete study on this point, it seems safe to say that all three opinions considered are, on this score, contrary to the point made in the authentic response of the Code Commission referred to above, not because of the language of that response, but because the response appears to nullify the argument based upon the necessity of such liberal interpretation to realize the benevolence of the Legislator. The phrase " cum jam omnia sunt parata " has some restrictive force. The meaning of the phrase and the emergency contemplated must be determined.

II. The situation, in general, for which dispensing power is provided in canon 1045 must be determined, in some way or other, by the phrase " cum jam omnia sunt parata ad nuptias."

Cappello, in his preliminary discussion of the foregoing phrase,[10] distinguishes, at least implicitly, and, it seems, validly, between the literal meaning of the phrase and the canonical force. When the canon speaks of all things being in readiness, it does not mean some thing, anything or a certain thing. " ALL things " is the wording, " ALL things " the meaning. That author validly appeals in argument to the express wording of the phrase, the common rules of speech, and, in accordance with canons 6 and 20, to the common acceptance of the phrase among the approved authorities of pre-Code law, from which source the phrase is bodily lifted. According to that interpretation, the phrase indicated three things; viz., 1) imminent, or almost imminent, celebration of marriage; 2) the preparations for marriage, exclusively or principally, prescribed by the Church; 3) the readiness, at least morally speaking, of ALL these preparations.

The canonical force of the phrase is quite another thing. It is not a condition, but a simple circumstance. It is not

[9] *De Matrimonio* (ed. 4, 1939), n. 235, 40.

[10] Cappello, *De Matrimonio,* (ed. 4, 1939), n. 232, 233.

exclusive, but indicative. It is not taxative, but descriptive. In other words, whenever there is realized in fact that general emergency which USUALLY occurs, when it does occur, at a time when everything is in readiness for the wedding, then the power of canon 1045 may be applied. The arguments employed in support of this stand are principally these: 1) the desire of the benevolent Legislator to provide for each and every case of truly urgent necessity, (it might be added, not otherwise provided for); 2) the juridical impossibility of accepting as a real condition *sine qua non* a clause indefinite in meaning, i. e., admitting various shades of interpretation; 3) the force of the phrase as employed in the old law whence it derives, which was that of an example, one of two outstanding examples, in fact, the *casus perplexus,* of truly urgent necessity. The validity of this interpretation, with the necessary reservations, is corroborated by a striking presentation of the law of canon 1045 in a decision of the S. R. Rota.[11]

The situation contemplated, therefore, is the *casus perplexus,* celebrated in pre-Code law, with this all important additional feature, that one of the elements of the *casus,* viz., difficulty of recourse, is contemplated and provided for not only in terms of pastor and Ordinary, but also in terms of Ordinary and Holy See. The Rotal decision just mentioned[12] points to that fact and its implications. " Fieri itaque non potest quod in novo iure locutio illa (scil: omnia parata) servet unicum inflexibilem valorem quem habet in sacris Litteris (Matt. XXII, 4), quemque servare poterat in vetere, ubi casus perplexus considerabatur solum in ordine ad parochum et ad solam impossibilitatem adeundi Ordinarium ". Since, therefore, in the Code the situation contemplated is merely described in its most usual form, and not defined in exclusive terms, it is easily understood that the principle of judgment for individual cases should be that neatly expressed by Ver-

[11] *S. R. Rotae Dec.,* XVII (1925), 199.

[12] *Loc cit.*

meersch.[13] "Verba 'cum jam omnia sunt parata ad nuptias' stricto sensu de materiali quasi apparatu nuptiarum intellegenda non sunt. Cum finis legis sit providendi casibus urgentioribus et ad dispensandum requirat tantum probabile periculum gravis damni, illa verba potius adjuncta ordinaria casus urgentioris ad modum exempli designat, et ratio habenda est de gravi difficultate differendi matrimonium per tempus necessarium ut Ordinarius per litteras a S. Sede dispensationem accipiat". The same principle holds for those in § 3, except that the dispensation is to be sought from the Ordinary, so that a much shorter delay is involved in the calculation.

The situation contemplated, therefore, in canon 1045, seems to be an emergency arising in a planned or prepared marriage.

III. The exercise of the power of canon 1045 imposes upon the individual enjoying that power a particular judgment about such emergency, to be made in individual cases, just as in the application of the power of canons 1043-1044. The following section is concerned with the essential elements involved in that judgment, viz., the essential elements constituting the situation to be verified for the valid use of canon 1054.

A. Preparations prescribed by Canon Law for ecclesiastical marriage must have been inaugurated.

1. That some preparations for marriage must have been inaugurated before one may even contemplate the application of canon 1045 seems to follow from the authentic response referred to early in this discussion.[14] The inference from that response is that canon 1045 is more restricted than canon 81, and that the latter canon extends to certain conditions not covered by canon 1045. This latter canon is broader in the impediments to which it extends. It must be narrower in terms of the condition "cum jam omnia sunt parata". On all other counts it is at least equally broad as canon 81, in matrimonial dispensing power, a point hypothetically admit-

[13] Vermeersch-Creusen, *Epitome*, II, n. 308, 2.

[14] *AAS*, XXIV (1942), 241.

ted by Cappello.[15] This point is further established, at least by implication, by the next section.

2. That the preparation must be canonical is more difficult of proof. The point to be made is not that non-canonical preparations may not have taken place, or may not in one way or another affect the question of the dispensing power of canon 1045. Rather it is simply this that the preparations completed may not be exclusively those in which the Church has no interest.

In support of the contrary position, which cannot be denied extrinsic probability, there must be acknowledged the following. De Smet,[16] without treating *ex professo* the quality of the preparations required, does make this explicit reference to the quantity. "Ad hoc autem ut omnia censeantur ad nuptias parata, sufficit ut dies fuerit statutus, aut invitationes sint missae, aut banna coeperint proclamari". Furthermore, a Rotal decision quotes almost verbatim the foregoing passage.[17] ". . . . . ad cuius effectum sufficit, ut dies saltem fuerit praestitutus, (intra quem dispensandi facultas impetrari nequit a S. Sede), invitationes missae, banna publicari coepta vel ab eis dispensatum etc." By way of negative argument on this point, let it be sufficient to observe that some of these preparations are either themselves canonical, or else they imply canonical preparation. Determination of marriage date and distribution of matrimonial invitations *per se* are not canonical. But because it is hardly likely that either commentator or the S. R. Rota honors the civil contract among Catholics as "marriages", especially in the light of the language to be later quoted, the determination of date and the issuance of invitations imply consultation with an important member of the party, the assisting priest for the marriage.

The position holding for the need of canonical preparations is set forth by Cappello,[18] and is sustained by the S. R. Rota.

[15] Cappello, *De Matrimonio,* (ed. 4, 1939), n. 235, 30.

[16] De Smet, *De Sponsalibus et Matrimonio,* n. 765 (2).

[17] *S. R. Rotae Dec.,* XIX (1927), 74.

[18] *Op. cit.,* n. 232, 70.

"Die autem 27 Octobris, omnibus documentis necessariis (cfr. can. 1030 § 1) receptis, quorum postremum datum est V. die 25, binis publicationibus iam peractis, res CANONICE paratae ita erant ut (can. 1030 § 1) die 4 Novembris matrimonium celebrari potuisset. Praesertim attendendam ducimus circumstantiam secundae peractae publicationis, in qua, ni fallimur, quaedam iuris praesumptio videtur constitui favore facultatis Ordinarii can. 1031 § 2, 20. Quod vero nuptiali anulo nondum fuerat caelata dies '6 Novembris 1920', quod invitationes nondum typis mandatae essent et similia, attenta moderata prorsus pompa iam praevisa, attenta facilitate qua haec parari brevissime possunt, id in facto rem non immutat, MULTOQUE MINUS IN IURE, cum voluntas legislatoris ad haec quemquam minime coarctet".[19]

The argument supporting the claim that some of the preparations must be canonical, as set forth by Cappello, in the section just mentioned is this. "Verba can. 1045 § 1: 'cum jam omnia sunt parata ad nuptias' passim occurrunt apud veteres theologos et canonistas".

"Porro iuxta omnes doctores, ea verba a) respiciunt aut immediatam omnino aut fere immediatam matrimonii celebrationem; b) referuntur aut unice aut praesertim ad quae in ordine ad matrimonium parari debent *ex praescripto Ecclesiae;* c) supponunt revera omnia, saltem moraliter, esse jam parata"

"Proinde, ad normam can. 6, 20, nonne illa verba aestimanda sunt 'ex veteris iuris auctoritate, atque ideo ex receptis apud probatos auctores interpretationibus'?"

Another consideration in favor of the need of something more than the mere determination of the date for marriage, without reference to the ecclesiastical cooperation in the matter of determination, is based on the relationship of canon 81 and canon 1045. As already pointed out, by virtue of the authentic reply of the Code Commission already mentioned twice, "cum jam omnia sunt parata" has some restrictive

[19] *S. R. Rotae Dec.*, XVII (1925), 203, n. 9. Emphatic capitalization inserted.

force which makes it necessary that for the valid exercise of canon 1045 some condition not necessary for the valid exercise of canon 81 must be verified. If the mere determination of a date is sufficient for the condition required in canon 1045, then it is not more restricted than canon 81, since the exercise of the latter power depends upon danger in delay, which presupposes some ultimate date beyond which it is dangerous to postpone the marriage while awaiting the dispensation.

A final consideration of the need of some ecclesiastical cooperation in the preparation of the matter is based on the consequences of the contrary opinion. By this latter stand the parties to the marriage planned, instead of being subject to the laws of the Church, make the Church subject to their own will.

2. The "*matrimonium contrahendum*" in canon 1045, § 1 must be, if the foregoing be true, ecclesiastical marriage, since the Church prescribes preparations for no other. And it would further seem that the "*matrimonium contrahendum*" is ecclesiastical marriage, if what is to follow immediately be true, viz., that the "*matrimonium convalidandum*" must be an invalid ecclesiastical marriage,—since the urgency is as great, if not greater, in the case of a civil marriage already contracted and requiring validation than in the case of a prospective civil marriage.

That the marriage referred to in canon 1045, § 2—"*convalidatione matrimonii iam contracti*"—should be a marriage enjoying at least the *species matrimonii* is suggested by the language and procedure of the S. R. Rota in a given case. The case in question treats of the validity of the ecclesiastical marriage of a couple who had already been civilly married for some years prior to the ecclesiastical ceremony. The couple was impeded from ecclesiastical marriage by the fact of consanguinity. Referring to the civil marriage of the couple the decision employs the phrases "legali concubinatu" and "civilem init concubinatum" [20] echoing the frankness of Cap-

[20] *S. R. Rotae Dec.*, XIX (1927), p. 70, n. 1, and p. 78, n. 11.

pello,[21] speaking of all marriages among Catholics where the substantial form has been entirely neglected. The same decision seems to make the point quite clear. "Confundenda ad rem non sunt damna vel mala, quae Auctores passim corrivant ex impossibilitate separationis vel fraternae cohabitationis inter pseudo-coniuges donec dispensatio a S. Sede obtineatur; haec enim spectat convalidationem matrimonii iam contracti et malorum pericula in mora concessionis dispensationis impendentia, quae nihil habent commune cum matrimonii celebratione inter concubinarios, et cum malis inde datis vel relatis".[22] Civil marriage, the situation in point, is not treated as even a good imitation. The procedure is even more convincing. Bearing in mind the principle of canon 1014, it is interesting to note that in reviewing the case for the possibly valid use of canon 1045 by the dispensing Ordinary, the Tribunal categorically eliminates the possibility of the phrase "cum jam omnia sunt parata" having been verified, and mentions not at all, even as doubtfully fulfilling the alternate situation, "convalidatione matrimonii iam contracti", the circumstance of previous civil marriage.[23] That some Catholics could be validly married by civil ceremony alone is not a valid objection to the foregoing conclusion, since *per se* all Catholics are bound by form, and the accidental element of exemption for a small group can hardly serve as a general rule of procedure.

B. During the course of these preparations there must come to the Ordinary, or the priest designated by canon 1045, § 3, the knowledge of the existence of an impediment till that time unknown to him, regardless of knowledge anyone else may have had of the same impediment.[24]

C. Postponement of the wedding till the arrival of the necessary dispensation from this NEWLY DISCOVERED im-

[21] *De Matrimonio* (ed. 4, 1939), n. 894.

[22] *Ibid.*, p. 74, n. 6.

[23] *Ibid.*, p. 80, n. 14.

[24] Cf. Pontifical Code Commission's Response—*AAS*, XIII (1921), 177.

pediment by the usual dispensing agent, i. e., the Holy See or the Ordinary, must involve the probable danger of grave harm to someone.

1. The question of postponement involves first of all a calculation in time, viz., that amount of time necessary to obtain the required dispensation from the Holy See or the Ordinary. This interval will obviously differ with the different places where the situation may arise and their respective speed of communication with Rome by post; indeed, the interval may differ with different occasions, even where the same Ordinary is concerned, because of many conditions. Hence, the S. R. Rota points out, in the light of this consideration alone, the phrase "cum jam omnia sunt parata ad nuptias" must have a flexible meaning, and not the immediate sense of scriptural usage or of the *casus perplexus* of pre-Code law, which was considered only in terms of pastor and Ordinary, a process normally requiring very little time.[25] It follows also as a necessary implication, that very little preparation for the marriage may have taken place, since the decision speaks of a 20-day interval as being necessary for recourse in some cases. Little more than that is required for full reading of banns.

2. The *terminus a quo* of the calculation is the moment of detection of a *heretofore unknown* impediment. Such seems to be the mind of the S. R. Rota in another decision. "Cum igitur constet, nuptias numquam fuisse paratas, otiosa resultet indago, QUANDONAM ad parochum impedimenti notitia pervenerit; haec enim intime connectitur cum urgenti necessitate, EX FACTO DESUMPTO, QUOD OMNIA AD SINT AD NUPTIAS PARATA, quo exulante, ulterior indago supervacanea redditur".[26] The first factor, preparation, must be verified before the second, detection of impediment, can be verified.

[25] *S. R. Rotae Dec.*, XVII (1925), p. 199, n. 4.

[26] *S. R. Rotae Dec.*, XIX (1927), p. 80, n. 14; *S. R. Rotae Dec.*, XVIII (1926), p. 324, n. 15. Emphatic capitalization inserted.

An explanation of this time of detection by the S. R. Rota is interesting. The element of *subsequent* detection is satisfied "etiam si tunc solum Ordinario aut parocho innotescat voluntas duorum, quos optime noverat in radice impedimento ligatos (v. g. quos affines sciverat) contrahendi inter se." [27] In other words, there seems to be implied a distinction between material knowledge of the fact which constitutes the impediment and the formal knowledge of that fact as an impediment. If the moment of discovery of that fact as impeding a marriage occurs "cum jam omnia sunt parata", canon 1045 can be utilized, at least as far as the element of detection is concerned.

There might occur the situation in which the Ordinary or priest had knowledge, both material and formal, of the impediment from the very beginning of the preparations and in time to follow the ordinary procedure, but forgot to obtain the dispensation. If the impediment is within the scope of canon 81, there is no difficulty for the Ordinary. But should the impediment lie beyond the scope of that canon there seems to be a genuine difficulty. Vermeersch maintains that under Cappello's opinion, this is an emergency covered by canon 1045, and the priest (hence also the Ordinary), with proper limitations may dispense. (It might be noted that the exception taken to Cappello's opinion does not affect this point. It is an emergency within a PLANNED marriage).[28] Mahoney cites the same solution for the identical case cautiously adding: "and even if it appears somewhat doubtful, canon 209 can be invoked for jurisdiction." [29]

3. Probable danger of grave harm to someone will result from postponement of the marriage till the required dispensation be received by normal procedure.

a) The mere delay or postponement is NOT the harm that warrants the use of canon 1045. "In utroque canone 81 et

[27] *S. R. Rotae Dec.*, XVII (1925), p. 199, n. 4.

[28] *Periodica*, XXII (1933), 43.

[29] *Clergy Review*, XIII (1937), 188.

1045 expressa fit mentio damni vel mali PERICULI, cuius causa unice sit repetenda a dispensationis dilatione in adeunda Sancta Sede".[30] This delay itself is not merely a danger; it is an actuality that can, and must, be deliberately calculated. And FROM THIS DELAY must arise the danger of harm. Hence, some effort should be made to consider postponement, and only after such an action has been judged dangerous, in the sense of the canon, may be the emergency dispensation be given.

b) The harm feared must be a *future* harm and not the continuation of some past or present evil. In this connection recall the reference in connection with the ecclesiastical character of the *matrimonium convalidandum*.[31] Adjacent to that same passage is found the following: ".... unde de damno vel malo IMPENDENTE SEU FUTURO agi debet. Consequenter publicus concubinatus, proles illegitime nata, vigens scandalum et necessitas hujusmodi mali reparandi, haberi nequeunt uti legitimae causae pro dispensatione largienda ad normam cit. canonum."[32] At first sight the fact of prior civil marriage does not seem to facilitate the use of the power given in this canon. On the contrary, it seems to exclude definitely this canon as a source of relief in emergency, unless some distinct harm can be indicated to justify the exercise of this power. It is true that, of itself, prior civil marriage is not the evil sufficient to warrant the use of canon 1045. But frequently, thinking carefully one might say generally, where the other conditions of the canon are verified in relation to the marital adjustment of a couple civilly married, there will be verified also the danger of real harm in postponement. The initial lapse in failure to observe the proper form engenders the reasonable fear that if the present mood of repentance be not utilized, there will be no further opportunity, a loss result-

[30] *S. R. Rotae Dec.*, XIX (1927), p. 74, n. 6. Emphatic capitalization inserted.

[31] *Loc cit.*

[32] *Loc. cit.* Emphatic capitalization inserted.

ing primarily from delay. Frequently the opportunity for ecclesiastical revalidation results from the sincere spirit of repentance of one of the parties to the marriage, with the consequent willingness to cohabit in continence until the revalidation be effected. But the importunities of the unrepentant party cannot be resisted indefinitely, presuming impossibility of actual separation, and the RELAPSE into sinful association may actually be the result of a short delay. The presence of children of a civil marriage involves considerations for their future besides that of legitimacy, e. g., their loss to the Church if their parents remain estranged from the Church because of an initial error. In general, canon 2254 offers a fundamental consideration when it grants extraordinary power of absolution from censures where perseverance in the state of grave sin would be hard for the penitent, and where the perseverance is due only to ecclesiastical law, since the dispositions of the penitent are all that can be desired. Moral theologians hold that the confessor may stimulate the penitent to that state of remorse, where it will be difficult for him to remain in that state of grave sin.[33] The same principle might be applied in this case, so that given a genuinely important reason for revalidation at all, in the urgency of revalidating it now, the sincere remorse of one party with the concomitant desire to repair the harm done throws the burden of awaiting remedy and the consequent danger of relapse on the delay for dispensation. An interesting statement by the S. R. Rota seems to bear out the idea that the probable danger of relapse is sufficient for the demands of the canon. " Atque dilatio haec probabile inferebat periculum gravis damni. Ut enim ex ipsorum nupturientium testimonio colligitur, periculum imminebat, si non concubinatus, saltem incontinentiae. Et sane, Alicia iam confessa fuerat se inhonestas relationes habuisse cum Livio ".[34] The condition feared as the outcome of delay was identical with that which actually existed before

[33] Noldin-Schmitt, *De Sacramentis*, (1934), n. 368, 1; Arregui, *Summarium Theologiae Moralis*, (ed. 11, 1930), n. 614, 1.

[34] *S. R. Rotae Dec.*, XVIII (1926), 321, n. 9.

the marriage, viz., convenient copulation *per modum actus sed in animo habituali.* The situation considered before the marriage differed from the case of civil marriage among Catholics in only two respects, both accidental. It was not strictly concubinage, which is habitual incontinence with the same person; it was not "legal concubinage", as civil marriage had been termed. So that if a return to incontinence of the premarital state is the great harm involved, so also should the return to habitual incontinence with the same person, under the protection of the law; especially since in the latter case there is normally present the necessary occasion of sin.

c) The grave harm need not be certain. It is sufficient that there be a *probable danger* of said grave harm. Some notable remarks on this point are these. ".... remittitur aestimanda arbitrio Ordinarii, [or the priest, as the case may be], dummodo ratione regatur, quod presumitur. Non sufficit quidem mera possibilitas, sed nec requiritur certitudo futuri periculi; agitur enim de sola praevisione, nam probabile dicitur periculum si iuxta humanam praevisionem imminere timetur. Praevisio autem ista fit ex causis, quarum igitur *existentiam* dispensans allegare et probare debet; quia si et ipsa sit dubia, possidet utique lex; sed *sufficientiam* plene probare coram judice praesertim non tenetur, quia in dubio possidet facultas, (cfr. c. 84), sufficit itaque si excludatur negligentia in ea sufficientia apprehendenda, et praesertim fraus et dolus malus qui in rem influere potuerit; nam haec nemini patrocinari valent. Horum igitur iuridica probatio si deficiat, praesumptio stat pro Superiore [the dispensing agent] ...." [35]

d) The nature of the harm feared is so general that it is impossible to give adequate illustration by examples or cases. Cappello confines his discussion of this point to these brief remarks, which are unchallenged in substance by other authors.[36] "Malum grave potest esse spirituale vel etiam temporale, sive proprium sive alienum; eiusmodi esset, v. g. scan-

[35] *S. R. Rotae Dec.*, XVII (1925), 200, n. 5.

[36] *De Matrimonio*, (ed. 4, 1939), n. 234, 50.

dalum, infamia, poena subeunda, notabile damnum patrimoniale, periculum concubinatus, graves rixae, iurgia, etc." The point was raised concerning the need of a *causa dispensationis,* so that distinction might have to be made between the *causa dispensandi,* which would be the situation described in canon 1045, and the *causa dispensationis,* as usually understood, and divided into canonical reasons, primary and secondary, and non-canonical. The distinction, not found in the authors, seems to be unnecessary and unwarranted. The absolute wording of the canon seems to indicate a situation in which a dispensation, not only may, but should be given, so that the *periculum mali gravis* is at once, a constituent element of the emergency warranting the concession to an inferior of power to dispense from the general laws of the Church, and the cause of the dispensation. The S. R. Rota speaks of the probability of great harm in such terms as to indicate that it is the cause of the dispensation. A distinction is made between the existence and the sufficiency of causes, in relation to the term *periculum gravis mali,* and the point is made that, in doubt the agent is always free to dispense. Canon 84 is cited, which canon in § 2 has to do with the doubtful sufficiency of the cause of dispensation.[37] As a matter of fact, the harm contemplated will, in one way or another, be encompassed by one or several of the usual causes.

d) The danger of violation of a secret will serve as well as danger of grave harm from delay to warrant use of this power by a simple priest. Delay resulting from the use of regular channels for obtaining a dispensation is to be measured in terms of appeal to the Ordinary by post. Hence, in view of the much shorter period required for such a petition and response, there is much less need for the priest to employ the power of canon 1045. Even though there be sufficient time to make the necessary petition to the Ordinary and have it granted without delaying the marriage, the power can still be employed, if observance of such procedure would involve

[37] *S. R. Rotae Dec.,* XVII (1925), 200, n. 5.

the danger of violation of a secret, sacramental or otherwise. The power extends to the case in which it is necessary to guard the secret from the Ordinary himself.[38] Vermeersch offers this rule of thumb for evaluating the character and obligation of the secret. "Satis est igitur ut impedimentum occultum manere possit idque partes ob rationalem causam exoptent." [39] If the case involves an impediment already public in fact there can be no secret to be protected and no power of dispensation for the priest on that basis, since the power is restricted to occult cases, viz., cases in fact, even though public by nature.[40]

IV. By way of conclusion, it might be well to attempt a practical statement of the significance of the phrase "cum jam omnia sunt parata." To that end, a brief appreciation of the three opinions with which this discussion started had better be stated.

All three seem to have been in error in making canon 81 exactly coextensive with canons 1043-1045. But the erroneous interpretations followed two different lines. *Il Monitore Ecclesiastico* and Cappello deprived the phrase "cum jam omnia sunt parata" of all restrictive force, and made canon 1045 as broad, so to speak, as canon 81. De Smet, in principle, admitted a restrictive force in that phrase, and made canon 81 as narrow, so to speak, as canon 1045.

Within the realm of a planned marriage, though Cappello and De Smet differ in principle on the significance and canonical force of the phrase, they seem to be in agreement in practice, since the one extends the power to any emergency, (even outside a planned marriage), and the other accepts as fulfilment of the phrase the least possible preparation. However, De Smet's insistence upon the necessary coexistence of the elements of the canon is such that one step in preparation might be sufficient to verify the element required by the phrase.

[38] Cappello, *De Matrimonio,* n. 237.

[39] Vermeersch-Creusen, *Epitome,* II, n. 311, II.

[40] Cf. Response of Pontifical Code Commission—*AAS,* XIII (1921), 177.

Combining the reflections upon the authors with the implications of the authentic response with which we began,[41] these seem to be certain conclusions.

1. The power of canon 1045 is restricted by the phrase "cum jam omnia sunt parata." This is the substance of De Smet's statement that the phrase is taxative—but only for canon 1045.

2. The significance of the phrase is to be determined by its use and interpretation among pre-Code authors for whom it was one of two outstanding examples of matrimonial emergency. The phrase is descriptive in this that it is indicative of a class of emergency most commonly realized in these terms. Cappello states that in so many words, though extending the class too far; De Smet admits it in practice by accepting under this canon as possible emergencies marriages with ANY preparation completed.

3. The correct interpretation would seem to be that the power of canon 1045 extends to any emergency within a planned marriage, the specific degree of planning being of no actual importance since the emergency is measured by three terms: a marriage in preparation, discovery of impediment during preparation, danger in delay of dispensation. All three in combination constitute the emergency.

The phrase itself "cum jam omnia sunt parata", in the sense of the canon seems to be best translated by the American colloquialism "when everything is all set." When we say that something "is all set", it is generally by no means literally true. As a matter of fact, perhaps only a single preparation has been made, e. g., permission to do something that requires a great deal of careful preparation. Similarly people think of their marriage as being "all set," when there are still many things to be done. What they mean is that sufficient preparation has been made to make them feel assured that the wedding will take place as planned, even though a great deal of time and activity still intervene. This may well

[41] *AAS*, XXXIV (1942), p. 241.

be the idea behind the statement of De Smet that in order that all things be considered in readiness for the wedding, it is sufficient that the day be determined. In our own opinion, " everything is all set ", in the mind of the canon, when preparations for marriage—ecclesiastical marriage—have reached the stage where the parties dare not wait without great harm, and can't go ahead without a dispensation. The Church settles the problem by granting emergency power to let this couple go ahead as planned.

A *"nota pro praxi"* can terminate this treatment. All three canons, 1043, 1044, 1045, are calculated to meet those two species of emergency pointed out by pre-Code authorities as the principal examples of urgent necessity. In the light of the purpose of this legislation, which is shot through with abundant difficulities, more so in the specifications of actual use than in the specifications of urgency warranting the use, canon 209 assumes a very consoling and compelling character. Consoling, because it does supply the jurisdiction in these numerous and various truly positive and probable doubts, a point freely acknowledged by commentators and the S. R. Rota. Compelling, because, in view of the fact that in such doubt canon 209 will supply jurisdiction, and in view of the fact that there is real danger of great harm, otherwise the use of the powers would not even be contemplated by a prudent person, the principles of the moral theologians assume a very pressing character, when they assure us that one may licitly use supplied jurisdiction in a positive and probable doubt of law or fact without any grave cause.

Confronted with the situation which reasonably seems within the competence of these three canons, one might think twice, first of some way to reach a superior to grant the necessary dispensation; and, secondly, if the first quest be fruitless, of the great responsibility to deal with the emergency for which he has been equipped by these canons.

INSUFFICIENT CANONICAL CAUSES FOR MATRIMONIAL DISPENSATIONS*

THE question discussed in May at the New York meeting of The Canon Law Society was the following: Can dispensations from matrimonial impediments be granted when the sole *causa motiva* alleged in the petition affects exclusively the non-Catholic parties to the marriages? For clarity and exactness, certain delimitations of even this restricted question will be useful.

First, the question concerns any and all impediments to marriage: consanguinity, affinity, age, *crimen, raptus,* etc.; for none of these are necessarily excluded by the fact that one party to the marriage happens to be a non-Catholic. However, one impediment will be necessarily present, *ex hypothesi,* in each and every instance under examination,—namely, difference of religion in one or other of its two forms. Hence it will be practical, and entirely sufficient, to discuss merely the principles which govern the issuance and validity of dispensations from Mixed Religion and Disparity of Cult. The same conclusions which are reached concerning these impediments will apply *mutatis mutandis,*[1] to all the impediments of ecclesiastical law.

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[1] Canon 1042 lists certain impediments as of minor degree, and states that all others are of major degree. In this connection, canon 1054 provides for valid dispensation of the impediments of minor degree even when the sole *causa finalis,* alleged in the petition, is false. Equivalently, in the case of minor impediments, there is needed for validity merely some *causa impulsiva.* Again, not all the impediments of major degree are prohibited with the same severity, as is seen in the fact that some are more readily dispensed than others. Finally, not all causes have the same weight, and any given cause may be made more grave or less grave by circumstances of the individual case.

Secondly, the question will be considered with reference merely to dispensations granted in the ordinary course by the Bishops of America. Negatively, there will be no consideration of dispensations granted directly by the Holy See,[2] nor of dispensations granted in the emergency cases covered by canons 1043 and 1045.

In ordinary course, our Bishops dispense by virtue of their quinquennial faculties, and hence by delegated power. Their acts are therefore governed by canon 84, and particularly by the last clause of this canon, which invalidates any dispensation from the general law of the Church which is granted by an inferior officer, in the absence of a just and reasonable cause.

There is therefore a very real possibility that certain dispensations will be invalid under this canon. This gives rise to a strict duty to examine the commonly asserted causes for dispensation, and to determine their gravity and sufficiency. Such a study is a difficult and complex task.[3] It is agreed that not all of the canonical causes have the same weight, and hence that many of them are not, singly and in the absence of

[2] It is agreed that the Pope, as supreme lawmaker, can validly dispense from his own laws without a *causa motiva;* cf. Wernz-Vidal, *Ius Canonicum,* V (Romae: Apud Aedes Universitatis Gregorianae, 1925), n. 429, p. 518; Gasparri, *Tractatus Canonicus de Matrimonio* (ed. 9, 2 vols., Romae: Typis Polyglottis Vaticanis, 1932), n. 297, p. 241; hereafter cited *De Matrimonio.* It is forcefully stated in canon 1061 that even the Holy See does not dispense from Mixed Religion and Disparity of Cult without just and grave reasons; and so, in practice, the discussion of papal powers is not of practical moment.

[3] Cf. Gasparri, *De Matrimonio,* I, n. 295, p. 181; Cappello, *Tractatus Canonicus-Moralis de Sacramentis,* III, *De Matrimonio,* (Romae: Apud Aedes Universitais Gregorianae, 1927), n. 259, p. 285, hereafter cited *De Matrimonio;* De Smet, *De Sponsalibus et Matrimonio,* (ed. 4, Brugis: Car. Beyaert, 1927), n. 817, p. 683. With special application to mixed marriages in Europe, cf. Ter Haar, *De Matrimoniis Mixtis Eorumque Remediis,* (Taurini, 1931), n. 62, p. 43; for the United States, see the excellent Catholic University dissertations, Schenk, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult,* The Catholic University of America Canon Law Studies, n. 51, (Washington D. C.: The Catholic University of America, 1929), n. 287, p. 194; and O'Mara, *Canonical Causes for Matrimonial Dispensations,* The Catholic University of America Canon Law Studies, n. 96 (Washington, D. C.: The Catholic University of America, 1935), p. 72.

special circumstances, sufficient for the dispensation of mixed and disparate marriages, which *Ecclesia severissime ubique prohibet.*[4]

Without entering into any detailed study of this matter, some general considerations may be noted. First, the Holy See does not recognize, as a cause for dispensation, the mere fact that the parties are madly in love with each other and are determined to marry.[5] There exists, unfortunately, an opposite persuasion among many Catholic laity; and it is even possible that some pastors share the view that the will of the parties is the real reason for granting the dispensation, as apart from (what are falsely considered) the purely technical and legal causes that are required in the petitions addressed to the Bishop.

Secondly, it is clearly established law that the mere willingness of both parties to sign and fulfill the *cautiones* can not be considered a cause for granting the dispensation.[6] Here again an opposite impression commonly exists. It would seem desirable that canonists in their teaching and writing, and Bishops in their administration of dioceses, should emphasize the law of the Church in this regard.

Thirdly, despite the fact that dispensations from Mixed Religion and Disparity of Cult are issued in the United States in tremendous numbers, the official teaching of the Church still classes these impediments as of an exceedingly grave nature. Accordingly, authors teach that many canonical causes would be sufficient for other impediments (i. e., for remoter degrees of consanguinity and affinity) but would not suffice for cases of religious difference. Canon 1060 is phrased, grammatically, in the superlative degree,—*severissime prohibet;*

[4] Canon 1060.

[5] Cf. Ter Haar, *op. cit.*, n. 63, p. 43.

[6] Canon 1061 carefully distinguishes the *cautiones* from the just and grave causes required. Cf. also Litt. Encycl. S. C. de P. F., (March 11, 1868), in *Collectanea S. Congregationis de Propaganda Fide,* (2 vols., Romae: ex Typographia Polyglotta Vaticana, 1907), II, n. 1324, p. 10, hereafter cited *Collectanea P. F.;* and the text of the Third Council of Baltimore, n. 131, which reproduces this instruction.

and canon 1061 requires not merely the *justae et rationabiles causae* of canon 84, but also the graver *causae justae et graves.*[7] Accordingly, canonists will not admit the sufficiency of such commonly cited causes as *angustia loci, aetas superadulta mulieris, paupertas viduae, incompetentia dotis, bonum pacis* and others.[8] Here again, there would seem to be need of some further instruction and correction from competent authority.

With these observations in mind, it remains to be determined what causes there may be which, of their nature, can be alleged as affecting exclusively the non-Catholic party. Public causes,—namely those which have to do with the well-being of the Church or of the local community of Catholics,—refer only to a Catholic. Among the private causes, those generically listed as *causae infamantes* will ordinarily arise from and refer to a situation which involves the Catholic as well as the non-Catholic party; and hence these too cannot be considered to refer exclusively to the non-Catholic.[9]

This process of elimination leaves very few causes which can refer to one party exclusively: namely, *angustia loci, incompetentia dotis, aetas superadulta mulieris,* and *paupertas viduae.*[10]

[7] Ter Haar (*l. c.*) notes that the verb *urgeant* in canon 1061 is stronger than the verbs used elsewhere, which could have been used here; such as *adsint, suadeant,* etc. For discussion of the gradation of causes as *graves,* cf. O'Mara, *Canonical Causes for Matrimonial Dispensations,* p. 50.

[8] Cf. Schenck, *op. cit.,* p. 195, and authors there cited. But concerning *aetas superadulta,* cf. *S. R. Rotae Decisiones,* XVIII (1926), 169-170, in which it appears that *aetas superadulta viduae* is considered to be a double cause, and therefore grave. For detailed examination of each cause, as in the United States, cf. O'Mara, *op. cit.,* 72 ff.

[9] In more detail, something of public interest is implied in the following causes: *cessatio notorii concubinatus; remotio gravium scandalorum; periculum matrimonii extra Ecclesiam; periculum incestuosi concubinatus; lites; bonum pacis; spes conversionis; excellentia meritorum.* Normally the Catholic would also be involved in: *nimia familiaritas; copula jam habita; copulae suspicio; revalidatio matrimonii civilis; diffamatio mulieris.*

[10] Curiously, these causes are normally reserved to women; only rarely and in very special circumstances could they be seriously urged as forcing a man to accept a certain definite marriage. Hence, the case before the conference is reduced to the situation in which a Catholic man is seeking a dispensation

And immediately it must be noted that these four causes are among those which are less grave, and which canonists do not consider sufficient for the more serious dispensations. Particularly in America, there would seem to be little reason to consider these as serious *causae motivae,* unless very special circumstances attend the individual case. Accordingly, dispensations from Mixed Religion and Disparity of Cult should not issue when these causes are the only ones alleged; and if issued, canon 84 would cause serious question as to the validity of the dispensation, and, in cases of Disparity of Cult, of the marriage contracted in virtue of the dispensation.

The conclusion just reached would, of itself, serve to dispose of the question before this conference. However, there remains the broader question of issuing dispensations to non-Catholics. To discuss this question, the matter of the sufficiency of the alleged cause will be disregarded. It will be presupposed that the terms of the question can be met, and that somehow a sufficient *causa motiva* can be alleged which refers exclusively to the non-Catholic. In these circumstances, can a valid dispensation be issued?

As regards the non-Catholic, it is clear that he or she has no claims which the Church is bound to recognize as a matter of justice and strict right. Canon 87 is a statement of the basic constitutional law of the Church, deriving from the will of Christ Himself. It is by baptism, and by baptism alone, that any person is constituted a member of the Church, and given the rights and privileges of membership. Hence, the unbaptized have no Church rights to press. Furthermore, even after baptism, it is necessary to remain in the communion of the faithful; otherwise the rights given by baptism may no longer be exercised. Consequently, the baptised non-Catholic is duly warned by the latter part of the canon that his failure in faith will estop him from exercising any rights of membership.

It follows therefore as a matter of law that the non-Catholic cannot claim a matrimonial dispensation as a right. But

to marry a non-Catholic woman, and alleges as cause one which affects exclusively the woman.

could he not ask the dispensation as a favor? and could the Church not grant him as a favor that to which he had no strict right? This question is purely theoretical, and need not be debated here. In actual fact, whatever be the possibilities of the matter, the Church has decided on a fixed and rigid policy of not granting matrimonial dispensations in favor of non-Catholics. This is stated unequivocally by all the authors who treat of the matter.[11]

In both pre-Code and post-Code writings, it is universally taught that Rome itself does not, and delegated Bishops cannot, grant matrimonial dispensations, directly, to any save the Catholic parties to marriages. If the Catholic has presented no canonical cause, he has, equivalently, eliminated himself from consideration: there is no reason why the favor should be granted him. If a cause is presented affecting exclusively the non-Catholic party, Rome rules that this cause is to be rejected. Consequently, the petition is left without any *causa motiva* at all; and Rome will not, and delegates cannot under canon 84, give a favorable answer. Gasparri[12] quotes formulas of dispensation whose text carefully indicates that the dispensation is granted directly to the Catholic party, and for the Catholic's benefit.

The foregoing answer is purely legal. Behind it is a moral and dogmatic answer which deserves repetition. We in America are all too much exposed to the heresy that it does not matter what a man believes,—the only important thing is what he does. We are apt to overlook the basic teaching of Christianity that faith in the revelations of Christ is a funda-

[11] A consultation of available authors reveals no explicit, detailed and reasoned treatment of this question. Rather, canonists have seemed to think that the answer is obvious, deserving of no extended attention. Hence their statements are given in *obiter dicta;* in footnotes and even in sadly-humorous references to the foolish mistakes which Rome has discovered in its inspections of dioceses in which the law and practice of the Church are not sufficiently known. For the convenience of those who have not at hand a full canonical library, these texts are cited in full in an appendix to this article.

[12] *De Matrimonio,* (ed. 1932), II, Alleg. V, pp. 432 ff.

mental and necessary condition for eternal life. It was so important that man know correctly his duties to God, to his neighbor and himself, that God Himself became man, lived amongst us, and became Himself our teacher. That this teaching should not perish, He established His Church. The *depositum fidei* is then the Church's greatest treasure. Her greatest prerogative, infallibility, was granted her so that this treasure should never be corrupted.

The negative side of this teaching is equally important. In complete opposition to the ordinary American judgment, moralists class the various sins against faith,—infidelity, apostasy, heresy, and schism,—immediately after *odium Dei.* For these sins are, intrinsically, denials of God's essential attributes of Wisdom and Veracity; the denial of His teachings is, at least implicitly, an imputation of lack of knowledge or of truthfulness. Hence the malice of these sins is indefinitely greater than the malice of sins against mere men, such as treason, murder, or impurity.

The Church, then, would be false to her divine commission if she failed to characterize public failures in faith as most serious objective crimes, even though there may be present subjective excuses of ignorance and good faith. And if the crime is so judged, it is obvious that the Church cannot show any marks of public and official favor; and cannot, therefore, grant dispensations which are, of their nature, official acts of of favor. Many Americans, held emotionally by their preconceptions, may fail to agree with this doctrine, and may cry out that it is narrow, prejudiced and unchristian. But Rome, holding fast to its age-long teaching office, remains firm and always will remain firm in this basic duty.

The question, however, may be pressed under another form. It may be asked: are our American Bishops held to the same severe doctrine and practice which Rome has adopted? The answer must still be in the affirmative. The reasons cited above are universal in their nature, and apply equally throughout the Church. And if authority be sought, explicit state-

ments can be found in the writings of all canonists. Cappello writes: .... *rescripta nec ... ab inferioribus R. Pontificis concedi possunt;* and Wernz-Vidal: ... *inferiores Romani Pontificis etiam impedimenta in sola parte acatholica existentia relaxare non possunt;* and Payen: *Delegatus vel pollens facultate ordinaria dispensare nequit infideles ... haereticos.*[13]

But again it is important to find a basic reason for this answer. It lies in the nature of agency and delegation. All agents, in canon law as in civil, are bound by the principle *Ne ultra vires.* An agent is the creation of his principal. He has just those powers, and no more, that the principal chooses to give him. And even though he is convinced that he is wiser or better informed than his principal, he cannot validly act in ways not appointed in his mandate. And if, perchance, he does so act, the violation of his mandate entails an automatic nullity.[14]

With this in mind, there is need only to investigate a question of fact. When Rome grants to American Bishops faculties to dispense from Disparity of Cult and Mixed Religion, does she give the Bishops free rein and unlimited power to exercise these faculties as they see fit? or did Rome insist that the Bishops follow always the *praxis* of the Roman Curia in the same cases?

Anyone who knows Rome at all will immediately answer, on general principles, that Rome undoubtedly had in mind the second alternative. In addition, there is abundant evidence that the delegation of dispensing power was always restricted to the limits which Rome itself observed. Historically, it was to safeguard these limits that Rome always reserved to herself the power to dispense in cases of religious difference, making exception only for missionary countries and others at a distance.[15]

More explicitly, Rome has insisted on these limitations in the texts in which she published lists of canonical causes.

[13] Cf. full texts and exact citations in appendix to this article.

[14] Cf. canon 203, § 1.

[15] Cf. Gasparri, *De Matrimonio,* I, n. 593.

Thus, on September 26, 1754, the Holy Office answered a difficulty proposed by Henricus Maria de Fleury, Archbishop of Tours.[16] This Archbishop had faculties to dispense *pauperes*, and said that he knew that

> .... Summus ipse Pontifex ..... nonnisi pro causa inhonesta cum talibus pauperibus ordinario saltem dispensat.

He felt, however, that there were cases in which dispensations should be granted for *causae honestae*. Accordingly he wrote to Rome, implicitly acknowledging that he was bound to follow the Roman practice, and that he would need special permission to depart from this practice.

Rome explicitly confirmed this principle. Her answer was to inform the Archbishop that he was somewhat mistaken in his ideas of Roman practice, and hence they would give him a statement of the causes actually used in Rome. In addition the Holy Office quoted directly from the Pope:

> Tuum enim erit, ut ipse SSñus D.N. addidit, his iisdem uti regulis, quum delegatus a delegantis moribus et consuetudine vel tantisper recedere nec possit nec debeat.

The delegated Bishop must not stray even a hairsbreadth from the practice and custom of the Pope; and this as a matter both of liceity and validity.

Secondly, the Sacred Congregation for the Propagation of the Faith issued a list of causes on May 9, 1877.[17] The instruction is introduced by the statement that many petitions are presented to Rome which do not contain a sufficient canonical cause: hence the necessity of setting forth the principal causes which have, by custom, been found sufficient for the granting of matrimonial dispensations. After listing sixteen causes and adding other information, the Instruction concludes:

> Haec prae oculis habere debent non modo qui ad S. Sedem pro obtinenda aliqua matrimoniali dispensatione recurrunt,

[16] *Collectanea P. F.*, I, n. 393, p. 232.

[17] *Collectanea P. F.*, II, n. 1470, p. 104.

> sed etiam qui ex pontificia delegatione dispensare per se ipsi valent, ut facultatibus, quibus pollent, rite, ut par est, utantur.

The phrase *rite ut par est* is vague; it does not clearly distinguish liceity and validity; but there is no doubting the teaching: that Bishops who act by delegated powers are bound to follow the standard, as to causes for dispensations, established by Rome and stated in this Instruction.[18]

Finally, discussing this question, Gasparri adds a decision of the Sacred Penitentiary, dated June 1, 1858.[19] The question was asked: Must a delegated Bishop necessarily and for validity, follow the same rules which are used in the Roman Curia when the Pope Himself dispenses the same impediments in the same degree? The Sacred Penitentiary answered in the affirmative.[20]

In summary, proof was offered that Rome refuses to accept causes alleged solely *ex parte acatholica.* Next it has been shown that Bishops, acting by delegated powers, are bound to follow the *praxis* of Rome in their judgment of canonical causes; and this under pain of invalidity. The conclusion is

[18] A third listing of canonical causes was issued by the Apostolic Datary in 1902—*Acta Sanctae Sedis,* XXXIV (1901-1902), 54, ff. The Datary did not dispense from Mixed Religion or Disparity of Cult, and hence the Instruction does not refer to these impediments. However, the issuance of this Instruction was patently based on the general principle stated above: that the *praxis* of Rome was official and to be followed throughout the Church.

[19] *De Matrimonio,* I, n. 420, p. 248.

[20] Gasparri's comment is couched in the broadest terms: "Hinc indultarius nequit dispensare, nisi propter causam canonicam, quae in praxi Sanctae Sedis motiva est; et habere debet tamquam impulsivam tantum vel prorsus inefficacem eam causam, quae talis est in praxi Curiae Romanae; secus non solum illicite sed etiam invalide dispensat, si causa canonica revera non existat; illicite sed valide, si causa canonica, quam ipse putat non existere, reipsa existit."

Other authors agree. Cappello, *De Matrimonio,* n. 250, p. 279, cites this passage almost verbally. Cf. also: Schmalzgrueber, *Jus Ecclesiasticum Universum,* IX, n. 147, p. 258; Wernz, *Ius Decretalium,* 6 vols., Vol. IV, *Ius Matrimoniale Ecclesiae Catholicae,* (Romae, 1904), n. 510; n. 629, footnote 148. Wernz-Vidal, *Ius Canonicum,* V, n. 419, p. 508; n. 429, note 97, p. 517; Cappello, *Summa Iuris Canonici,* (ed. 2., 3 vols., Romae: Apud Aedes Universitatis Gregorianae, 1932), I, n. 143, p. 161.

inevitable that no Bishop may validly issue a dispensation in the case proposed for this conference; and, more broadly, that no Bishop may validly dispense on the basis of causes which Rome has adjudged to be insufficient for the impediment to be dispensed.

Practical Conclusions

1. *Ex parte Oratoris.* The belief, unfortunately not uncommon, that the requirement of causes for dispensation is a pure technicality may lead to the allegation of utterly false causes: with consequent invalidity of the dispensation, according to canon 42, § 2. In other cases, the causes alleged may refer exclusively to the non-Catholic party: with consequent invalidity of the dispensation according to canon 84, § 1. Finally, the causes alleged may be true, and may refer to the Catholic party, and yet be not sufficient, according to the standards set by Roman *praxis,* to be rated as *causae motivae*: with consequent invalidity of the dispensation, since the Bishop acts beyond the limits of his mandate, and incurs the nullifying effects of canon 203, § 1.

To avoid these various sources of invalidity, stricter standards could well be enforced, particularly as to the investigation and proof of the objective facts and circumstances surrounding a projected marriage.

2. *Ex parte Cancellarii.* If, in a petition for dispensation, a Bishop detects a cause which refers exclusively to a non-Catholic, or, more broadly, any cause that is insufficient, he should normally return the petition to the sender, with a notation concerning the lack of canonical cause, and a statement that the dispensation has not been granted. This procedure is always safe and correct.

However, it has been suggested that the result may be delay, misunderstanding and much correspondence; and that, to obviate these difficulties, the Bishop could cross out the faulty cause and insert in its place another valid and sufficient cause which, from long experience, is known to be present. Thus *aetas mulieris acatholicae superadulta* might be cancelled, and

in its place be substituted *periculum matrimonii extra Ecclesiam.* The question then arises as to the validity of the dispensation granted after such substitution.[21]

It can be admitted that it is true with moral universality that petitioners, if denied the dispensation they seek, will simply contract a marriage before a minister or a justice of the peace. However, exceptions are not impossible. The Catholic may have the proper degree of faith and moral fiber. In the ordinary case, the Bishop has before him no information concerning the character and intention of the petitioner; hence he cannot entirely exclude the possibility that the given case is the exception to the rule.

Before 1885, an actual investigation of the individual case was required for validity; for the formula faculty to dispense then contained the clause *si veritate niti repereris.* Since that time, the clause has been changed to *si preces veritate nitantur,* and according to canon 40, this condition is implied in all rescripts, and hence in all dispensations. Validity rests, not directly on investigation, but rather on objective fact.[22]

It follows therefore that a dispensation based on a cause substituted by the Bishop will be valid in those cases in which the cause is actually verified in fact; but invalid if objective truth does not correspond with the cause asserted.

3. *Ex parte Tribunalis.* Within the scope of this discussion, diocesan Tribunals may be called upon to judge marriage cases based upon one or both of two asserted grounds of nullity: that the alleged cause for dispensation was not true: or if true, was not canonically sufficient for the particular impediment dispensed.[23]

[21] No comment is here attempted as to the morality of this time-and-trouble-saving procedure. Furthermore, for economy of argument, it is presupposed that the substituted cause is entirely sufficient to serve as a *causa motiva;* as to this presupposition, cf. Ter. Haar, *op. cit.,* n. 65, p. 46 ff; O'Mara, *op. cit.,* p. 116, ff; 122, ff.

[22] Cf. Gasparri, *De Matrimonio,* (ed. 1892), I, n. 367, p. 232. O'Mara, *op. cit.,* p. 58, ff; *S. R. Rotae Dec.,* XVIII (1926), Decisio XXI, p. 169, ff.

[23] These cases can only arise when the impediment was Disparity of Cult or some other diriment impediment; in the case of impedient impediments,

Obviously, cases of this type cannot be settled by executive investigation and decree, nor by the summary process of canon 1990. Rather they must follow the ordinary course of trial, including appeal by the Defensor Vinculi if the first instance results in a decision of nullity.

Trials on the first ground, namely falsity of the alleged *causa motiva,* will be largely restricted to weighing the evidence as to the objective fact. To overcome the presumed validity of the marriage and the equally presumed validity of the dispensation, the plaintiff must show by unimpeachable evidence that the objective facts were in complete contradiction to the cause asserted. Thus it would be necessary to prove, in given cases, that a woman was only twenty, whereas it was asserted that she was *superadulta;* or that a Catholic was absolutely determined not to marry at all if the dispensation were denied whereas the petition asserted *periculum matrimonii extra Ecclesiam.* The Tribunals will have no more than usual difficulty in hearing and weighing the evidence offered and in determining whether or no the plaintiff has proved his case beyond all reasonable doubt.

Trials based on the second ground, that the cause alleged amounted to only a *causa impulsiva,* and was not in law or in fact a sufficient *causa motiva,* will involve a determination of the objective fact of seriousness; but also, in many cases, the legal question as to the standard set in Roman *praxis.* Many or most of these cases will end with reasons on each side, i. e. positive doubt. The Tribunal will be led to a decision *Non constare de nullitate,* both because the case has not been proved beyond reasonable doubt, and also because of canon 84, § 2.

There may be, however, certain cases in which there is no objective doubt. It may be conclusively shown that there were no special circumstances in the individual case, and that the cause alleged is one which is uniformly rated as not sufficient for a more serious impediment. In this case, a decision

the marriage will, of course, be valid even though the dispensation issued was invalid.

Constare de nullitate would necessarily result. Nor can the fact that the Bishop issued the impediment in good faith be considered a reason that changes the objective facts or the legal valuation of the cause.

Question may also be raised concerning the opinion of Michiels, who holds that if a dispensation is sought and granted in good faith, it must, by presumed will of the Pope, be held probably valid even if it is later discovered that the cause was not objectively true. In support of this opinion, he quotes Sanchez and Schmalzgrueber, and alleges canon 6, 2°, as justifying the post-Code continuance of their doctrine.[24]

Tantum valent Auctores quantum rationes. It would seem that Michiels should be overruled. First, on general principles, this doctrine would deprive canon 84, § 1, of application, except in the unlikely case of a dispensation granted by a Bishop who granted it in bad faith, with full knowledge that obreption was being practiced. Secondly, Michiels' opinion seems to be based on a misconception. As O'Mara[25] has modestly but convincingly shown, Sanchez and Schmalzgrueber actually were not discussing the case in which later investigation showed the cause to have had no foundation in fact, but rather the quite dissimilar case in which the later investigation proves merely that the cause, which had real existence, was not as serious as the Bishop had considered it. With this support removed, Michiels' opinion is seen to be without foundation. Finally, the opposite doctrine is strongly supported by the S. R. Rota and by other canonists who touch on this particular point.[26]

[24] Michiels, *Normae Generales Iuris Canonici,* (2 vols., Lublin: Universitas Catholica, 1929), II, 510.

[25] *Op. cit.,* p. 82 ff.

[26] *S. R. Rotae Dec.,* XVIII (1926), Decisio XXI, p. 169. Cf. Cappello, *Summa Iuris Canonici,* (ed. 2, 3 vols., Romae: Apud Aedes Universitatis Gregorianae, 1932), I, n. 133, p. 147; *De Matrimonio,* n. 280, 4, p. 312; De Smet, *De Sponsalibus et Matrimonio,* nn. 917-920, pp. 766, ff.

APPENDIX

Texts concerning the non-acceptance of causes referring exclusively to non-Catholics:

1. Pius VI, rescript to the Cardinal Archbishop of Mechlin—*Fontes Codicis J. C.*, n. 471:

> . . . . cum dispensatio gratia sit, reservatur haec fidelibus sub Ecclesiae obedientia viventibus; unde ad haereticos non debet extendi, qui non agnoscendo eiusdem auctoritatem per hoc se reddunt similis indulgentiae indignos; . . . .

2. Holy Office, Instruction to China—*Fontes*, n. 822:

> [Curent missionarii] . . . . . ut eae dispensationes non nisi vere catholicis indulgeantur, ...

3. Holy Office, to Southwark—*Fontes*, n. 989:

> [Dubium] Cum, in dispensando super matrimoniis mixtis, Ecclesia catholico viro aut mulieri cum anglicana muliere aut viro (in quo cadere Ecclesiae beneficia non debent) . . . . . [Resp.] Catholicos viros vel mulieres dispensari posse, iustis accedentibus causis, ...

The force of this text lies in the fact that the Bishop, in his *dubium*, states that he cannot directly dispense a non-Catholic; and the Holy Office, in answering, affirms this principle by telling him that he can dispense Catholics. The failure to mention that he can dispense non-Catholics, in this context, is a confirmation of the principle invoked by the Bishop.

4. Wernz, *Ius Decretalium*, IV, n. 586:

> Quae [S. Sedes] cum solummodo admittere soleat causas canonicas, quae existunt in parte catholica (id, quod non raro oblivioni datur), v. g. aetas superadulta, angustia loci nequit afferri ut causa canonica, si sponsa sit acatholica. Porro causae canonicae a S. Sede tanto rigore exiguntur, ut, si non afferantur, dispensatio negetur consuetis formulis: "*Causas non afferri, doceat de causis.*"

It is fair to deduce from this text that the second sentence refers back to the first and to the examples there given. In other words, if these causes were presented as affecting a non-

Catholic, Rome would rule that no cause at all had been presented.

5. *Ibid.*, n. 510, footnote 36:

> Quae facultas [dispensandi, Episcopis data] si amplissime conceditur, solet hanc formam habere: "Dispensandi cum suis subditis (i.e., catholicis, non haereticis vel schismaticis)."

6. *Ibid.*, n. 622, footnote 104:

> III. Delegati facultates dispensandi sibi concessas *directe* tantum applicare possunt in *favorem eorum* qui per baptismum facti sunt *membra Ecclesiae* nec earumdem propter haeresim vel schisma vel excommunicationem sunt incapaces . . . . .

7. *Ibid.*, n. 629, footnote 148:

> Porro quamvis profecto non prohibeatur allegare causas non canonicas et graves circumstantias, tamen ab ineptiis et iuris erroribus est abstinendum v. g. ab aetate superadulta—viri, vel angustia loci in favorem mulieris—acatholicae.

The dashes in the text express strongly the ineptness and legal absurdity, in Wernz' mind, of citing canonical causes referring to non-Catholics.

8. Gasparri, *De Matrimonio,* (ed. 1892), I, n. 416, p. 265:

> In impedimento mixtae religionis aut disparitatis cultus, necesse est ut pars catholica sit subdita (Episcopo dispensanti), cum dispensatio in casu in eam cadat.

9. De Smet, *De Sponsalibus et Matrimonio,* (ed. 1910), n. 379, footnote 2, p. 524:

> Gratia imploratur nomine . . . . unius partis dumtaxat, quando una tantum pars est catholica.

10. Wernz-Vidal, *Ius Canonicum,* V, n. 273, p. 314:

> Denique, ad legitimam dispensationem super lege *Ecclesiae* irritante de disparitate cultus, omnino requiritur:
>
> 1. ut *conditiones* jure divino et naturali necessariae verificentur,

2. ut *cautiones* de illis conditionibus adimplendis rite praestentur;

3. ut in singulis casibus *graves* et *proportionatae* adsint *causae cononicae* ex parte *fideli,* cui *directe* dispensatio conceditur; neque admittuntur causae in sola parte *infideli* existentes v. g. aetas superadulta mulieris *infidelis.*

11. *Ibid.,* n. 436, footnote 117, p. 522:

Supplicatio fit nomine *utriusque* sponsi, si sint catholici; secus solummodo nomine partis *catholicae,* cui soli *directe* in matrimoniis mixtis dispensatio conceditur; nam *oratores* . . . . . sunt ii soli qui "*orthodoxae fidei cultores vere existunt et sub obedientia S.R.E. vivunt vivereque et mori intendunt.*"

The quotation is from Benedict XIV, Ep. encycl. *Magnae Nobis,* June 29, 1748, found in *Fontes,* n. 387.

12. *Ibid.,* n. 423, p. 512:

Licet Ordinarius *directe* non possit dispensare nisi *dioecesanum* sensu explicato cum agitur de impedimento *absoluto* se tenente ex una tantum parte, v. gr. in impedimento voti . . . . . sufficit ergo in hisce impedimentis ut sit subdita *una pars,* i.e. alterutra, excepta disparitate cultus et mixta religione, in quibus oportet ut sit subdita pars *catholica,* nam cum haereticis *non conversis* Ecclesia formaliter non dispensat, unde inferiores R. Pontifici etiam impedimenta in sola parte acatholica existentia relaxare non possunt . . . . .

13. Gasparri, *De Matrimonio,* (ed. 1932), I, n. 414, p. 245:

. . . . . in impedimento *mixtae religionis* aut *disparitatis cultus,* necesse est ut pars catholica sit subdita, cum dispensatio in casu in eam cadat; . . . . .

14. Michiels, *Normae Generales,* II, footnote 1, p. 493:

Quapropter nihil impedit quominus Romanus Pontifex dispenset quoque cum acatholicis . . . . .; de facto tamen cum parte acatholica directe et formaliter dispensare non solet.

15. De Smet, (ed. 1929) *De Sponsalibus et Matrimonio,* n. 506, footnote 4, p. 443:

Si causa invocata non attenditur nisi ex parte unius nupturientis, sicut angustia loci et aetas superadulta quae non attenduntur nisi ex parte sponsae, ... notari juvat quod Ecclesia non admittat nisi causas existentes *in parte catholica.*

16. *Ibid.,* n. 817, footnote 2, p. 246:

In casu igitur quo dispensandum esset cum viro fideli ut ducat mulierem infidelem, non posset invocari angustia loci, quia cum dispensatio directe afficiat partem fidelem, causa illa invocaretur in favorem viri.

17. Payen, *De Matrimonio,* (3 vols., Zi-ka-wei, 1929), I, n. 861, p. 610:

Minime sufficit ut sponsi *cautiones* . . . . . admittere parati sint . . . . .; sed omnino justae et graves requiruntur *causae, eaeque ad partem catholicam* spectantes. (Quoting S. C. de P. F., 11 Mart. 1868—*Coll. Hongk.,* n. 1384).

18. *Ibid.,* I, n. 659:

Ne ultra personas.—Delegatus vel pollens facultate ordinaria dispensare *nequit:* directe

a. *infideles:* nam non sunt Ecclesiae subditi, etiamsi jam sunt catechumeni, aut cum parte catholica matrimonio conjungi velint;

b. *haereticos,* etsi baptizatos: nam haereticis, licet sint, ratione baptismi, Ecclesiae subditi, *non solent* concedi dispensationes matrimoniales; . . . .

19. Chelodi, *Ius Matrimoniale iuxta Codicem Iuris Canonici,* (ed. 3, Tridenti: Libr. Edit. Tridentum, 1921), n. 59, p. 59:

. . . . . causa requiritur utique canonica et gravis, quae existat pro parte catholica . . . . . Cautiones autem datae numquam causam constituunt.

20. *Ibid.,* n. 81, p. 84:

. . . . adsit quoque causa . . . . in parte fideli.

21. Cappello, *Summa Iuris Canonici,* I, n. 143, p. 152:

Q. Num haeretici et schismatici possint obtinere rescripta?
R. . . . . is qui *notorie* sectae acatholicae *adscripti sunt,* sive

in haeresi aut schismate nati et educati fuerint sive nati et educati in religione catholica postea ab ipsa defecerunt, rescripta nec conceduntur nec ab inferioribus R. Pontifice concedi possunt; id enim principiis generalibus disciplinae ecclesiasticae manifeste contradicit. Unde ex praxi Curiae, dispensatio matrimonialis, si alter nupturientium sit acatholicus, soli parti catholicae datur.

22. Schenk, *The Matrimonial Impediments of Mixed Religion and Disparity of Cult,* p. 197.

Attention is also to be called to the fact that such causes as *aetas superadulta,* and *angustia loci* must exist in the Catholic party, since the dispensation is given only to the Catholic party.

RESTATEMENT OF INTER-CHURCH-AND-STATE COMMON LAW

THE power of a sovereign to affect the rights of persons, whether by legislation, by executive decree, or by the judgment of a court, is called jurisdiction.[1]

The Roman Catholic Church has sole jurisdiction, as a sovereign, everywhere, over the form of celebration or solemnization of marriage of two baptized Catholics. This is not the extent of the jurisdiction of the Church over marriage, but herein only this one phase of the marriage law is used as an illustrative example. In canon law we usually speak of the *celebration* of marriage for that which we term in common law the *solemnization* of marriage. The Church not only does not concede to the State concurrent jurisdiction over this phase of the marriage, but, on the contrary, on the ground that "the marriage of two baptized persons is a Sacrament the Church claims *exclusive competence* in legislating, administering and passing judgment upon this sacramental contract. Every marriage contracted between two baptized persons, therefore, is subject solely to the law of the Church, and the State is totally incompetent to do other than legislate and pass judgment upon the temporal effects of this contract. These temporal effects are called the civil effects and are those effects which are separable from the substance of the contract itself, although flowing from it, such as property rights, rights of succession and heredity, dower rights, and, in general all financial matters."[2]

The Church has exercised this jurisdiction by prescribing the form of solemnization of marriage by legislative enactment.

[1] Joseph H. Beale, "The Jurisdiction of a Sovereign State"—36 *Harvard Law Review,* 241.

[2] Rev. James P. Kelly, "Marriage, Divorce, and Annulments"—THE JURIST, IV (1944), 246, at p. 249.

The present legislation has been substantially in effect since 1908 and in its present form is set forth in canon 1094 of the *Codex Juris Canonici*:

> Ea tantum matrimonia valida sunt quae contrahuntur coram parocho, vel loci Ordinario, vel sacerdote ab alterutro delegato et duobus saltem testibus, secundum tamen regulas expressas in canonibus qui sequuntur, et salvis exceptionibus de quibus in can. 1098, 1099.

Woywod translates into English this canon as follows: "Those marriages only are valid which are contracted either before the pastor or the Ordinary of the place, or a priest delegated by either, and at least two witnesses, in conformity, however, with the rules laid down in the following Canons, and save for the exceptions mentioned below in Canons 1098 and 1099." [3]

Every State has legislated as to the form of solemnization of marriages. In each of the State laws is a provision broad enough to include the canonical form of marriage of two baptized Catholics, the State thereby adopting as its own law the law of the Church as set forth in canon 1094. In doing this the State surrenders no part of its own sovereignty. It still retains jurisdiction over all its citizens in temporal matters. The Roman Catholic Church also preserves its jurisdiction over the members of the Church in spiritual matters, and especially in sacramental matters.[4] "Each of these two sov-

[3] Rev. Stanislaus Woywod, O.F.M., *The New Canon Law*, p. 221.

[4] Canon 218. § 1. Romanus Pontifex, Beati Petri in primatu Successor, habet non solum primatum honoris, sed supremam et plenam potestatem iurisdictionis in universam Ecclesiam tum in rebus quae ad fidem et mores, tum in iis quae ad disciplinam et regimen Ecclesiae per totum orbem diffusae pertinent.

§ 2. Haec potestas est vere episcopalis, ordinaria et immediata tum in omnes et singulas ecclesias, tum in omnes et singulos pastores et fideles, a quavis humana auctoritate independens.

As translated: § 1. The Roman Pontiff as the successor of the Primacy of St. Peter, has not only the prerogative of honor but also the supreme and full power of jurisdiction over the universal Church, in matters of faith and

ereign socities is *independently* and *exclusively* competent to regulate the affairs of men within its own sphere." [5]

In the United States where religious liberty is guaranteed by the Federal and State constitutions there are other churches which might claim recognition by the States as sovereigns in the same manner as the Roman Catholic Church is recognized. Some of these other churches which would probably be so recognized by the States as sovereigns are the Episcopal Church, the Presbyterian Church, and such others like them which have national organizations, with legislative, judicial and executive departments.

Dean Pound says:[6] "In the politics and law of the Middle Ages the distinction between the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of the temporal sovereign, that is, of a politically organized society, was fundamental. It seemed as natural and inevitable to have church courts and state courts, each with their own field of action and each, perhaps, tending to encroach on the other's domain, but each having their own province in which they were paramount, as it seems to Americans to have two sets of courts, federal courts and state courts, operating side by side in the same territory, each supreme in their own province. When the fifteenth-century English court held an act of Parliament 'impertinent to be observed' where it sought to effect results in matters spiritual, (Prior of

morals as well as in those that pertain to the discipline and government of the Church that extends itself throughout the whole world.

§ 2. This power is truly episcopal, ordinary and immediate, and extends over each and every pastor as well as over the faithful, and is independent from any human authority.—Woywod, *ibid.*, pp. 36 and 37.

[5] Kelly, *ibid.*, 247. Canon 1016. Baptizatorum matrimonium regitur iure non solum divino, sed etiam canonico, salva competentia civilis potestatis circa mere civiles eiusdem matrimonii effectus.

Canon 1012—§ 1. Christus Dominus ad sacramenti dignitatem evexit ipsum contractum matrimonialem inter baptizatos.

§ 2. Quare inter baptizatos nequit matrimonialis contractus validus consistere, quin sit eo ipso sacramentum.

[6] Roscoe Pound, "A Comparison of Ideals of Law"—47 *Harvard Law Review* 1, at p. 6.

Castleacre v. Dean of St. Stephens, Common Pleas 1506, Y. B. 21 Hen. VII, 1), it did what a court, state or federal, would do in the United States if a state legislature were to seek to prohibit interstate commerce by putting an embargo on imports from a neighboring state.

"How this ideal of a universal law of the universal church gave a permanent stamp to doctrines and institutions which has endured ever since may be seen in the law of marriage. The academic teachers of law, the doctors of the civil and canon law in the universities, had before them the ideal of a universal law, and the doctrine of the twelfth-century canonists has maintained itself everywhere as the basis of the law on this important subject. It is significant that in the face of the ultra-individualism of nineteenth-century law, in the face of the general emancipation of women and straining of the last century to treat all things in terms of the individual will, the idea of marriage as a condition which cannot be terminated by the act of the parties but only by nature or the law was able to persist. If we contrast the theory of marriage and the conception of marriage as creating a condition of the parties, not merely an obligation, which came into the law of all Christendom from the Middle Ages, with the diversity of divorce laws, which speak from the era of nationalism after the Reformation, the difference will tell us something of the power of an ideal of a universal law."

The source of this jurisdictional right of the Church is not derived from constitutional provisions, Federal or State. It is true that the Federal Constitution protects religious activities. As Mr. Justice Reed in his dissenting opinion in *Murdock v. Pennsylvania*,[7] decided by the Supreme Court of the United States on May 3, 1943, said: "The rites which are protected by the First Amendment are in essence spiritual—prayer, mass, sermons, sacrament—not sales of religious goods." The majority of the court went further than Mr. Justice Reed and included sales of books of sermons by itiner-

[7] 319 U. S. 105, 87 L. ed. 1292.

ant preachers, as a religious activity protected by the First Amendment. In the *Follett* case,[8] decided by the United States Supreme Court on March 27, 1944, Mr. Justice Reed joined with the majority in holding that a revenue measure which imposed a tax on resident preachers who sold books of sermons for their support was unconstitutional, as prohibiting the free exercise of religion.

The distinction between rights derived from sovereign jurisdiction and rights protected by constitutional provisions is clearly made in the case of *Watson v. Jones,*[9] decided by the United States Supreme Court on April 15, 1872. *Watson v. Jones* did not raise a constitutional law question. A principle of inter-church-and-state common law, only, was involved, viz., the respective jurisdictions of the State and a Church. In that case Mr. Justice Miller said:

"But it is very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character—a matter over which the civil courts exercise no jurisdiction—a matter which concerns theological controversy, church discipline, ecclesiastical government, and the conformity of the members of the church to the standard of morals required of them—becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the criteria by which the validity of the ecclesias-

[8] 88 L. ed. (Adv. Op.), 588.

[9] 13 Wall., 679, 20 L. ed., 666.

tical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, which would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would in effect transfer to the civil courts where property rights were concerned the decisions of all ecclesiastical questions.

"And this is precisely what the court of appeals of Kentucky did in the case of *Watson v. Avery, supra.* Under cover of inquiries into the jurisdiction of the synod and presbytery over the congregation, and of the general assembly over all, it went into an elaborate examination of the principles of Presbyterian Church government, and ended by overruling the decision of the highest judicatory of that church in the United States, both on the jurisdiction and the merits; and substituting its own judgment for that of the ecclesiastical court, decides that ruling elders, declared to be such by that tribunal, are not such, and must not be recognized by the congregation, though four-fifths of its members believe in the judgment of the assembly and desired to conform to its decree."

The same principle of inter-church-and-state common law was again raised and reaffirmed in the United States Supreme Court in the case of *Gonzales v. Roman Catholic Archbishop of Manila*[10] in 1929. In that case Mr. Justice Brandeis said at pages 136 and 137:

"The fact that the property of the chaplaincy was transferred to the spiritual properties of the archbishopric affects not the jurisdiction of the court, but the terms of the trust. *Watson v. Jones,* 13 Wall. 679, 714, 729 [20 L. ed. 666, 670, 676]. The Archbishop's claim in this respect is that, by an implied term of the gift, the property, which was held by the Church, should be administered in such manner and by such persons as may be prescribed by the Church from time to time. Among the Church's laws which are thus claimed to be applicable are those creating tribunals for the determination of ecclesiastical controversies. Because the appointment is a

[10] 280 U. S. 1, 74 L. ed. 131.

canonical act, it is the function of the Church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them. In the absence of fraud, collusion or arbitrariness, the decisions of the proper Church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation as conclusive, because the parties in interest made them so by contract or otherwise. Under like circumstances, effect is given in the courts to the determination of the judiciary bodies established by clubs and civil associations."

The Turkish case of *Selim Farag v. Dame Rosina Mardrous,* decided in 1894 in the Court of Appeal of Alexandria (Egyptian Mixed Court) [11] is even more striking.

The facts of this case were as follows. The Armenian Catholic Patriarch of Constantinople on August 23, 1886, and on November 18, 1887 pronounced in his ecclesiastical court a judicial separation between Selim Farag and his wife, and condemned him to pay to her 33,000 francs lump sum and 300 francs a month alimony. One Back, a creditor of Mrs. Farag, made a judicial seizure in the secular courts of the sum thus due from Selim Farag. On January 20, 1891, after due notice, Selim Farag appealed from the decision of the Patriarch to the Holy See; and the Congregation *de propaganda fide,* to which the matter was referred, by a decision of June 27, 1892 (approved by the Pope the same day), reversed both sentences of the Patriarch.

The creditor admitted that if the Holy See had jurisdiction to pass judgment on the right of Mrs. Farag to a lump sum and alimony from her husband, he would have no claim in the secular court. But he contended that the Holy See had no jurisdiction to pass judgment on the right of Mrs. Farag to the lump sum and alimony, and that his proceedings in the secular court to seize, as a creditor of Mrs. Farag, the sums decreed to be due her from her husband by the Armenian Catholic Patriarch of Constantinople should be held valid by the secular court.

[11] 19 Juris. des Trib. de la Réforme, 231. (Translated in Beale, *Cases on the Conflict of Laws,* I, 85).

The question which the secular court, the Egyptian Mixed Court, was called upon to decide was: Did the Holy See have jurisdiction to pass judgment, as a sovereign, setting aside the two sentences of the Armenian Catholic Patriarch?

The Egyptian Mixed Court gave judgment against the creditor. The court gave as the reason for its decision: "The decision of the Holy See, which has set aside the two sentences of the Armenian Catholic Patriarch of Constantinople, has, in Turkey, ... the authority of a sovereign judgment, and had the immediate effect of quite avoiding the two sentences."

"The Pope is the head of the Catholic Church. His jurisdiction extends directly over all bishops for the maintenance of the unity of the faith and the discipline; he is, as the Council of the Vatican proclaims, the Supreme judge of the faithful. They may appeal to him in all cases which are within the ecclesiastical jurisdiction; his sovereign power extends over the churches of the Orient as well as over all other churches in the whole world. By a recent bull of July 20, 1883, addressed to the Patriarchs, Archbishops, and Bishops of the Oriental rites, the Congregation *de propaganda fide* has reminded them of this fundamental rule of jurisdiction, especially with regard to matrimonial causes: 'To harmonize the rigorous observance of the Canon Law in this very important matter with the special conditions of the Ecclesiastical Courts of the Orient, appeals ought to be taken in the following order: if the first judgment has been given in the Diocesan Court, appeal shall be taken to the Patriarchal Court; and if judgment is given in the Patriarchal Court, appeal shall be taken to the Holy See'." . . . . "There is no doubt, therefore, that in granting the appeal of Selim Farag against the decisions of the Patriarch, and in setting them aside, the Holy See has acted within the bounds of its jurisdiction and its power."

"On the second point, far from disowning the authority and the right of jurisdiction of the heads of religious communities established in the Orient, the Sublime Porte has for a long time granted to these communities the most absolute right of conforming to the rules and rights of their religion. In such

a spirit were promulgated the Hatti Humayoum on February 18, 1856, the organic rule of the Supreme Court of Constantinople on 8 Zilhedje, 1284, and the law of the Vilayets in 1867. The idea and intention of the Sublime Porte are made still clearer by its spontaneous declaration in the Treaty of Berlin on July 13, 1878; in which it is said that 'the Sublime Porte having expressed the wish to maintain the principle of religious liberty and give it the widest extension,' it has been stipulated that 'the liberty and the open practice of all cults are assured to every one, and no hindrance shall be placed in the way either of the hierarchal organization of the different communions or of their relations to their spiritual heads'."

"The Berat of the Sultan, dated 21 Gamad Akher, 1303, accrediting the Patriarch Azarian after the confirmation of his election by the Holy See, inspired by the same principles, expressly imposes upon the Patriarch respect and observance of the laws of his church, orders that the Christians of his communion shall be judged in accordance with the rules of their rite and the laws of their religion, and makes the observance and respect of these laws by the Patriarch the condition of his continuance during his life. The constant practice of the Catholic Patriarchates of the Orient, Syriac, Chaldee, Copt, Maronite, Armenian, and Latin, has certainly been to render legal decisions in the name of the Pope, and to take appeals to him, without any opposition on the part of the local authorities or of the Sublime Porte. It is only necessary to read the circulars of February 3 and April 1, 1891, to be convinced that the Sublime Porte, in decreeing that in the future the decisions of the Patriarchates should be executed like the other judgments of the country, without any foreign intervention, had no other aim than to put such decisions beyond the reach of objections brought by the defendants before the local courts charged with the execution of judgments, and to give the Patriarch alone jurisdiction to pass upon the objections. One might therefore rely upon these circulars to establish the doctrine that the Patriarch's decisions are in future sovereign, and beyond all appeal except to the superior jurisdiction of the Holy See ....".

In Volume IV of THE JURIST (April 1944) 336, at page 337, Rev. Dr. Roelker of The Catholic University of America says, in reviewing Volume II of *The Canon Law Digest,* by T. Lincoln Bouscaren, S.J., S.T.D., LL.B.: "Under canon 3 there is a complete translation of the Concordat with Portugal. This is a very late Concordat and can be profitably studied in classes of Public Ecclesiastical Law. Interesting details in regard to the solution of problems of competence can be found in this Concordat. Matters pertaining both to the teaching of religion in schools and to the civil effects of marriage are sufficiently determined..... The second volume of *The Canon Law Digest,* now finally and definitely completed, will take its place with its companion first volume among the best sources of translated documents of Canon Law."

That portion of the Concordat between the Holy See and the Republic of Portugal, dated May 7, 1940, which specially refers to marriage is set forth, as translated into English by Bouscaren from the Italian, which appeared together with the Portuguese in the *Acta Apostolicae Sedis* for 1 June, 1940:

Art. XXII. The Portuguese State recognizes the civil effects of marriages celebrated in conformity with canon law, on condition that the marriage be registered in the proper office of the civil state.

The publications of marriage shall be made not only in the respective parish churches, but also in the proper civil registry office.

Marriages contracted at the point of death, or in imminence of childbirth, or whose immediate celebration is expressly authorized by the proper Ordinary for a grave moral reason, can be contracted independently of the preliminary procedure of making the publications.

The pastor shall within three days forward a complete copy of the certificate of the marriage to the proper office of civil registry, so that it can be registered there; the transcription must be made within two days, and communicated by the respective functionary to the pastor on the day immediately

following that on which it was done, with an indication of the date.

A pastor who, without grave reason, omits to forward the certificate within due time incurs the penalties of qualified disobedience, and a functionary of the civil registry who does not in due time make a transcription thereof shall incur the penalties provided in the organic laws of the service.

Art. XXIII. Marriage produces all the civil effects from the date of celebration, provided the transcription be made within the space of seven days. If not, it produces civil effects as regards third parties, only from the date of transcription.

The death of one or both parties to the marriage is no obstacle to its registry.

Art. XXIV. In accordance with the essential properties of Catholic marriage, it is understood that, by the very fact of the celebration of a canonical marriage, the parties renounce the civil right of seeking a divorce, which accordingly cannot be applied by the civil tribunals to Catholic marriages.

Art. XXV. Cognizance of cases concerning the nullity of Catholic marriage and the dispensation from ratified and non-consummated marriage, is reserved to the competent ecclesiastical tribunals and departments.

The decisions and judgments of these departments and tribunals, when they have become definitive, shall be brought before the Supreme Tribunal of the Apostolic Signatura for review, and then, together with the respective decrees of the Supreme Tribunal of the Signatura, shall be transmitted through diplomatic channels to the Tribunal of Appeal of the State that is territorially competent, which shall put them into execution and order that they be noted in the registry of the civil State, in the margin of the registry of the marriage.

In the United States the relative rights of the States and churches to exercise jurisdiction over persons and things, legislatively, executively, and judicially, are not determined by treaties and concordats between the States and the churches.

These rights are found in the common law. Comparison between inter-church-and-state common law may well be made with that branch of the law, known as Conflict of Laws ordinarily, and sometimes as Private International Law, viz., that part of the law of each state which determines whether in dealing with a legal situation the law of some other state will be recognized, be given effect or be applied. Beale, in discussing this point, says:[12]

"Upon what law can the sovereign's power be based? Is he subject to any law but his own? That could hardly be, and he remain sovereign. And if his jurisdiction is based upon his own law, since that, we are told, is only the legislative expression of his will, how when he wills to act can his jurisdiction to do so be limited by that law which he wills to create? The answer to these questions must be sought in an examination of the relation of a sovereign's will to that part of his law which we call international law. For it must be clear that if any law restrains a sovereign in the exercise of his powers it must be the law which fixes the rights and duties of nations among themselves. If it be legally wrong for a sovereign to exercise his will, it must be so because that infringes the rights of other sovereigns.

"International law is, in its broader sense, a body of principles framed in accordance with the legal sense of civilized nations, and developed in their practices; but in this sense it is of course not strictly law at all, in the ordinarily accepted sense. It is at least the territorial law of no state. But there is a very powerful incentive upon every sovereign to induce the incorporation of its provisions in his own law; that incentive is the desire to be received into good society. In order to be received into the society of nations each civilized sovereign consents to accept as part of the law that binds his land the principles of international law; and thus makes part of his law a body of principles which he has not created, and which he has no power of himself to change.

[12] Beale, *ibid.*, pp. 241, 242.

"This is not the only instance of such an anomalous condition. Those sovereigns who consent to allow foreigners to be tried in their own consular courts in accordance with their own law are accepting as part of the territorial law a law which the sovereign of the territory has not made and cannot unmake; and so of the Moslem sovereigns who allow their Christian subjects to be tried in courts of their own church, in accordance with their own ecclesiastical law. [Beale at this point cites the *Farag* case.]

" It cannot be doubted that all countries governed by the common law have in fact accepted international law as part of the common law; and that the principles of that law which give or withhold jurisdiction are therefore principles of our common law."

Beale's analysis of the source of sovereign power inherent in a State is inadequate. Kelly correctly states the source of the sovereign power of both the State and the Church.[13] He says: "With regard to human law, the Church adheres to the doctrine that all authority is from God, and that in God's plan for the orderly government of the world, He has delegated His authority to two perfect sovereign societies. Each of these sovereign societies is *independently* and *exclusively* competent to regulate the affairs of men within its own sphere. These two sovereign powers are the Church and the State. The Church was established by God for the spiritual welfare of man in this world and to lead him to an eternity of happiness in heaven. The State was constituted as the supreme authority for the temporal welfare of man in this world. . . . . .

"The legitimate civil authority, which we shall call the State, is considered by the Church to have been granted authority from God to legislate, administer and pass judgment within its own sphere, but that sphere is confined to the temporal welfare of man in this world to the exclusion of his spiritual welfare, and the means established by God to lead man to eternal life."

[13] Kelly, *ibid.*, p. 247.

Beale had said: "If it is legally wrong for a sovereign to exercise his will, it must be so because that infringes the rights of other sovereigns." It follows that it is legally wrong for a State to exercise its will whenever such exercise of the will of the State infringes the jurisdictional rights of a sovereign Church. It is submitted that all States have in fact accepted or should accept such inter-church-and-state law as has been ordained by God as part of their common law. The principles of inter-church-and-state law which give or withhold jurisdiction should be the principles of their common law, in much the same manner as the principles of international law, or conflict of laws, which give or withhold jurisdiction are principles of our common law.

In 1934 the American Law Institute promulgated its *Restatement of the Law of Conflict of Laws* in a single volume. In the introduction it was stated: ". . . . it will be seen that it has taken eleven years to complete the Restatement of Conflict of Laws as set forth in this volume. The subject has presented very great special difficulties. Extraordinary as it may appear in view of the fact that we are a nation of forty-eight states, each with its own body of law, these special difficulties are in the main due to the fact that the legal profession has failed until recently to recognize the great practical importance of the subject. Although the Reporter, Mr. Beale, and some of those among his Advisers have for many years given courses in the Conflict of Laws in their respective law schools, instruction in the subject has been far from universal and there has been no such general long-continued critical study of the subject as has been given to Contracts, Property and the other principal subjects of the common law. Due to this pedagogical neglect the courts, confronted with questions of Conflicts of Laws, have not, in many cases, brought to their solution an adequate background of knowledge. As a consequence, the opinions accompanying their decisions are not, taken as a whole, helpful as they are in the many other fields of our law. Apart from this main source of special difficulty, the Conflict of Laws necessarily involves every branch of the

law and therefore the accurate expression of its rules has involved extended consultations with the Reporters for the other subjects undertaken for restatement. Some appreciation of the difficulties will be had from the statement that the Chapter on Administration was developed from the consideration of some sixteen successive preliminary drafts at an equal number of conferences. While this Chapter presented more difficulties than any other, many Chapters have had problems which could only be solved by consideration and reconsideration at several conferences."

The inter-church-and-state common law should be restated. Here, too, as in the case of the restatement of the Law of Conflict of Laws the task will be tremendous. A restatement of the ecclesiastical law of all or even of any one church is not being advocated. No doubt the laws of many churches need no restatement. Certainly the admirable format of the *Codex Iuris Canonici* precludes the need of any restatement of the laws of the Roman Catholic Church. *The Catholic Encyclopedia* sets forth the reasons for the restatement and codification of the laws of the Church and the manner in which this work was prosecuted and completed in a special article of its supplementary volume. It says:[14]

" For many centuries a multitude of ecclesiastical laws had been enacted, not a few of which had in the course of time been abrogated or had fallen into desuetude, while others had become either difficult to enforce or less useful for the common good. These laws, moreover, were to be found only in incomplete scattered compilations, so that many of them were unknown even to the learned. Pius X, realizing how helpful it would be for the restoration and permanency of Church discipline to end this inconvenience, decided in March 1904, to codify the ecclesiastical laws, abolishing obsolete decrees, adapting others to the needs of the age, and enacting new ones where expedient. The Archbishops of the entire world were directed to confer with their suffragans and the other ordinaries who are obliged to assist at provincial synods and to in-

14 *The Catholic Encyclopedia,* Supplement, s. v. " Code of Canon Law."

form the Holy See what modifications and corrections of the laws they deemed especially necessary. The work was carried on under the direction of Cardinal Gasparri, and a commission of cardinals was appointed to examine, modify, and correct the proposed canons. The five original members of the commission were Cardinals Ferrata, Gennari, Cavicchioni, Vives y Tuto, and Cavagnis, with Cardinal Gasparri as *ponens*: these five scholars having died during the course of the undertaking their work was continued by Cardinals Vincenzo, Vannutelli, de Lai, Martinelli, Pompili, Bisleti, Van Rossum, Giustini and Lega. A copy of the Code as completed and corrected was sent before its promulgation to all the bishops and to those superiors of religious orders who are legitimately invited to oecumenical councils, in order that they might freely express their views in regard to the canons. After the death of Pius X the completed work was ratified, approved, and sanctioned by His Holiness Pope Benedict XV by his Bull '*Providentissima Mater Ecclesia*' (27 May, 1917), which decreed that the prescriptions of the Code should have the force of law from Pentecost, 19 May, 1918."

A restatement of the common law of the States of this country, in that special branch of the common law called inter-church-and-state common law, *only* is being advocated. Successful achievement of this task will be worthy of the great efforts required.

THE JURIST, published by the School of Canon Law of The Catholic University of America, with an editorial staff skilled in both the canon law and the common law, supervising, as the Reporter in the Restatements by the American Law Institute, contributions from canonists and common law jurists, furnishes an ideal vehicle within the Church for carrying on this movement to a successful termination. The new restatement of this branch of the common law should follow as closely as possible the format of the Restatement of the Law of Conflict of Laws, thereby taking advantage of the fruits of the years of labor by some of the greatest of the legal minds of the country.

For example let us parallel one principle of the law of Conflict of Laws as set forth in the restatement of that subject with one proposed principle for the Restatement of Inter-Church-and-State Common Law.

Section 121 of the Restatement of the Law of Conflict of Law provides:

"Except as stated in sections 131 and 132, a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with." [15]

"The subject of uniform marriage legislation has been before the Conference of Commissioners of Uniform State Laws since 1907." So wrote Ernest Freund in 1911.[16] Continuing, he said: "At the National Congress on Uniform Divorce Laws held in 1906, a committee had submitted certain important recommendations with reference to marriage licenses; but the Congress regarded this matter as beyond its scope, and recommended its consideration to the Commissioners on Uniform State Laws.

"No action was taken by the Commissioners in 1907. In 1908, at Seattle, the Conference received a lengthy report from the Committee on Marriage and Divorce, containing the draft of a marriage act. This draft was discussed in part at the Detroit Conference in 1909, and the matter referred to a new committee for further action. The result of this action was a new draft, which was presented to the Conference at Chattanooga in 1910. It was considered in Committee of the Whole, and substantially agreed to, but, in view of the importance of the subject matter and of the proposed changes in the law, the Conference deferred action to the next year (1911), recommending that the Committee consider the suggestions made in the course of the discussion, and that the provisions be brought to the notice of the profession and the public at large."

[15] This is a common law principle. Some states have reaffirmed it by statute. Cf. section 63 of Civil Code of California.

[16] Ernst Freund, "A Proposed Uniform Marriage Law"—24 *Harvard Law Review* 548, *passim*.

The Uniform Marriage and Marriage License Act was approved by the National Conference on Uniform State Laws in 1911.

The pertinent provisions of this Act as to solemnization of marriages are as follows:

"An Act relating to and regulating marriage and marriage licenses; and to promote uniformity between the states in reference thereto.

Be it enacted.....

Section 1. Marriage Contract; How Made.—Marriage may be validly contracted in this State only after a license has been issued therefor, in the manner following:

1. Before any person authorized by the laws of this State to celebrate marriages (and hereinafter designated as the officiating person), by declaring in the presence of at least two competent witnesses other than such officiating person, that they take each other as husband and wife; or,

2. In accordance with the customs, rules and regulations of any religious society, denomination, or sect to which either of the parties may belong, by declaring in the presence of at least two competent witnesses, that they take each other as husband and wife."

As to these two provisions of section 1 of the Act, Freund said in his aforesaid article:

"(6) *Form of Marriage*—The normal form of marriage is the declaration by the parties before an officiating person and two witnesses that they take each other as husband and wife. Three points are to be noted: (1) The law leaves it to each state to determine who has the right to officiate; nearly all states authorize clergymen, judges, and justices of the peace to solemnize marriages, and the disturbance of settled customs in that respect would not be desirable. (2) The declaration that constitutes the efficient act is that of the parties, and not that of the officiating person: this is in accordance with the common law and the law of the Catholic Church,[17] while the

[17] "It may readily be granted that there is a certain amount of misunderstanding between representatives of civil law (this signifies in the United

law of the Lutheran Church is believed to be different. (3) No particular form of declaration is prescribed, the ceremonial character of the whole act being normally sufficient to insure some explicit utterance. The witnesses are required to be competent, i. e., of sufficient understanding, but their incompetency would not invalidate the marriage."

" The bill further sanctions any form that is in accordance with the rites of a religious society.....".

The Commissioners' Note to the Uniform Marriage and Marriage License Act, as they wrote it in 1911, is as follows:

Officiating person. This section leaves to each state the qualifications of the persons who may celebrate the marriage ceremony.

Witnesses—Number. The number of witnesses required varies in different states—varying from one to three. The majority rule of two has been adopted.

Witnesses—Competency. The original report of the committee required "adult" witnesses. The Conference substituted the word " competent " being of the opinion that minors are as competent as parties sui juris.

Form of ceremony. A large majority of the states which have legislated upon the subject of mode or form of ceremony require as an essential to the marriage contract that the parties shall " declare in the presence of witnesses that they take each other as husband and wife."

Religious societies. Thirty-seven states provide for marriage ceremonies according to the customs, rules and regulations of Quakers, and other religious societies. Such ceremonies are in a sense merely marriage contracts in the presence of witnesses, without being performed by or before an officiating person. One of the chief purposes of this act being the procuring of a license in proper legal form, and the registration of

States the common law) and representatives of canon law, due to lack of communication—or of enough communication—on both sides. Without this communication each side is deprived of valuable assistance in its own field. Besides, a freer communication between the two might result in the discovery that both have much more in common than appears at first sight."—Rev. William R. O'Connor, " The Origin and Development of Canon Law "—The Jurist, IV (1944), 54, at p. 55.

said license, it is, of course, immaterial whether the marriage ceremony be performed by a minister or civil official or in the presence of the proper number of witnesses in conformity with the rules and regulations of the proper religious society.

Clause 2 of this section is in no sense a restriction upon, but is rather an enlargement of, the provisions of clause 1 hereof. Clause 1 provides for the celebration of marriage before some legally authorized official, whether ecclesiastical or civil. But since Quakers, and many others, object to any form of ceremony other than that prescribed by the religious society to which either or both of the contracting parties may belong, it was recognized by the Conference that such persons should be permitted to enter into the marriage relation in the method prescribed or authorized by their respective religious rites and ceremonies. Nevertheless, while conceding the right of such parties to be married according to the rules and regulations of any such religious society without the sanction of a legalized "officiating person," by merely declaring in the presence of at least two competent witnesses that they take each other as husband and wife, it was deemed essential that at least one of the parties should be a member of such religious society in order to entitle such parties to the benefit of the looser form of marriage contract authorized by said clause 2 of this section, which, being an exception to the general rule requiring a marriage ceremony to be performed by some officiating person, should go no farther than warranted by the circumstances of the case. In other words, where a religious society recognizes a marriage without any officiating person it should do so only because such marriage is binding on the conscience of at least one of the contracting parties as a member of the society, and the peculiar rights and privileges which may be granted to members of religious societies should not be extended to those who are not members so as to allow them to take advantage of the rules of the society to which they owe no obedience, and with which they have no affiliation. No such society itself would celebrate a marriage unless at least one of the parties was a member of the society. The phrase "any religious

society, denomination or sect," is broad enough to include not only Quakers, but every other denominational sect, or society, including the Ethical Society of New York, and other states, Christian Scientists, etc. None of these religious bodies would allow interlopers to be married according to their rules and regulations when neither of the parties had any connection whatever with the organization.

Just as under clause 1 there should be two competent witnesses, so also should there be under clause 2; and the parties should likewise " declare in the presence of such witnesses that they take each other as husband and wife."

Wisconsin adopted the Uniform Marriage and Marriage License Act in 1917, the effective date being January 1, 1918. Up to the present time no other state has adopted the Act.

The proposed section of Inter-Church-and-State Common Law might read:

The requirements of the marriage law of the state where the contract takes place shall be deemed to have been complied with in the following respects, viz.,

a. the necessity of a formal ceremony;
b. the person to perform the ceremony;
c. the manner of the performance of the ceremony;

if the requirements of the church where the contract of marriage takes place are complied with.

It is not a principle of common law that the parties must declare in the presence of *two witnesses* that they take each other as husband and wife, though the statutory enactment of this requirement by each state would appear to be wise legislation. In this respect the Catholic Church, with its canon law, and the Uniform Marriage License Act are in accord.

A Restatement of Inter-Church-and-State Common Law may well bring closer the ideal of a universal law of marriage, the oldest of our institutions, one established by God even before the creation of the State.

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A CASE OF BINATION *EXTRA LOCA SACRA*

THERE is a great number of Catholics at the prison near a parish church. The priest has always ministered to them when ill, but has never celebrated Mass there on Sundays. Mass on Sundays there would involve securing permission to binate. The general faculties of the Diocese apply only to bination in parish churches. Another problem is the place for saying Mass. May Mass be celebrated in the general assembly auditorium?

The solution of this case would seem to warrant dealing with the laws concerning the place for the celebration of Mass before entertaining the matter of bination.[1]

As regards place, according to the provisions of canon law Mass must be celebrated in a church [2] or oratory [3] consecrated or blessed according to the prescripts of law,[4] with the exception that domestic oratories cannot be consecrated or blessed after the manner of churches. These and semi-public oratories may be blessed with the formula of the Ritual used in the ordinary blessing of places or houses,[5] though there is no obligation to bless them. However, they must be reserved exclusively for divine worship and free from all domestic use.[6] Under the conditions prescribed in law, and by permission of the local Ordinary or by indult of the Holy See, Mass may be

[1] The writer plans to submit the discussion concerning bination for the immediately succeeding issue of THE JURIST, as a continuation of this article.

[2] Cf. can. 1161.

[3] Cf. can. 1188.

[4] Can. 822, § 1.

[5] Cf. *Rituale Romanum*, (ed. post typicam; ad normam C. I. C. accommodatum), Tit. VIII, capp. VI, VII. Cf. also Tit. VIII, cap. V.

[6] Can. 1196.

celebrated in these oratories.[7] In the case under discussion there is no place whatever set aside for divine worship. Moreover, the privilege of a portable altar, which could be used in this case,[8] is absent.

In general, then, it is the rule that Mass must be celebrated in a place dedicated to divine worship. Hence, it is not permissible for a priest to celebrate Mass in the general assembly auditorium mentioned in this case. However, the local Ordinary has the authority to grant permission to celebrate Mass outside a church and oratory, but only for a just and reasonable cause in some extraordinary case and only *per modum actus*. This permission may not extend to celebrating Mass in a bedroom. Mass must be celebrated in a decently appointed place, and a consecrated altar stone must be used.[9]

Special interest in the solution of the present case is focused upon the meaning of the terminology of the Code: a) *iusta tantum ac rationabili de causa;* b) *in aliquo extraordinario casu;* c) *per modum actus.*[10] In order to determine the meaning of these phrases, it will be necessary to consider pre-Code law and jurisprudence regarding Mass *extra loca sacra.*

The Council of Trent (1545-1563) enjoined upon the residential Bishops not to tolerate the offering of Mass by anyone in homes and in places entirely apart from the church and outside oratories dedicated exclusively to divine worship.[11]

This negative precept as to the place where Mass may lawfully be said suggests, in general outline at least, the present

[7] Cf. cann. 1192-1195.

[8] Cf. can. 822, §§ 2 and 3.

[9] Can. 822, § 4.

[10] This terminology was employed by the Holy See prior to *The Code of Canon Law.*—Cf. Sacra Congregatio de Sacramentis, *Romana et aliarum*, 23 dec. 1912.—*Fontes*, n. 2107. The phrase under b) in the text is, however, not found.

[11] "...neve patiantur [i. e., ordinarii locorum episcopi] in domibus, atque omnino extra ecclesiam, et ad divinum tantum cultum dedicata oratoria... sanctum hoc sacrificium a saecularibus aut regularibus quibuscunque peragi."—Conc. Trident., sess XXII, *de observandis et evitandis in celebratione Missae.*

law of the Code on this matter.[12] Hence, in passing it may be useful to note that the qualifications as set down in the terminology of the Council of Trent *"omnino extra ecclesiam"* has practical application today.[13] Accordingly, it is entirely compatible with the provision of can. 822, § 1 to have Mass in the sacristy of the church. The sacristy is properly speaking still part of the church, at least under a less strict interpretation. Moreover, the terminology of can. 822, § 1 may receive a liberal interpretation.[14] Such was the interpretation of pre-Code law in this particular, which interpretation likewise admitted the choir as an approved place for Mass, as also the side chapels of the church and those immediately joined to the church edifice, and those in the cemetery of the church,[15] because these places were considered part and parcel of the church.[16] There is no reason why a similar interpretation cannot be received for the law of the Code. Accordingly, it seems likewise entirely admissible by law to have Mass in the church basement, which is part of the church edifice, and which is, moreover, to be withdrawn from merely profane use;[17] this

[12] Cf. can. 822, § 1.

[13] Cf. Can. 6, 2°, 3°, 4°.

[14] Cf. cann. 18 and 19. Can. 19, in determining by exhaustive enumeration which laws must receive a strict interpretation, by implication allows other laws to receive a liberal interpretation within the proper signification of the legal terminology, in conformity with can. 18.—Cf. Van Hove, *Commentarium Lovaniense in Codicem Iuris Canonici*, Vol. I, Tom. II, *De Legibus Ecclesiasticis*, (Mechliniae-Romae: H. Dessain, 1930), n. 299.

[15] Cf. also can. 1194.

[16] Gasparri, *Tractatus Canonicus de Sanctissima Eucharistia*, (cited hereafter as *De SS. Euch.*), I, (Parisiis, 1897), n. 260, who quotes Gattico, *De usu altaris portatilis*, cap. X, n. 6.

[17] Cf. can. 1164, § 2. That there is an accepted distinction between the word *church* in a strict and in a liberal sense is apparent from the treatises of authors concerning the violation of churches. Cf. e.g., Gasparri, *De SS. Euch.*, nn. 245, 247; Blat, *Commentarium Textus Codicis Iuris Canonici*, III, *De Rebus* (cited *Comment. Text. C. I. C.*), (Romae, 1923), n. 22; Vermeersch-Creusen, *Epitome Iuris Canonici*, II, (5. ed., Mechliniae-Romae; H. Dessain, 1934), n. 489; Beste, *Introductio in Codicem*, (Collegeville: St. John's Abbey Press, 1938), p. 564; where (*locc. citt.*) the sacristy is not considered a part of

provision of law evidences that the basement is part of the sacred edifice. Nor would it be objectionable, provided the place is properly appointed,—as must obtain wherever Mass is to be had—to celebrate Mass in the vestibule of the church. In other words, in these instances Mass can properly be said to be offered in Church.[18]

It was the rule, therefore, according to the common ecclesiastical law since the Council of Trent that Mass could ordinarily not be celebrated except in churches or consecrated places, or at least in places blessed by lawful authority and those dedicated to divine worship,[19] and that ordinarily Bishops themselves were not permitted, except in their residence, to celebrate Mass or permit priests to do so outside these places; Bishops had no jurisdiction ordinarily to dispense in this matter.[20] This general rule enunciated in the Council of Trent that Mass must be celebrated in a place dedicated to divine worship obtained down to the time of the

the church in the matter of the violation of churches; nor the crypt, provided it has no entrance into the church (cf. Vermeersch-Creussen, *loc. cit.*), but only from outside the church; nor the chapels in the basement, with the same provision as to entrance (cf. Beste, *loc. cit.*).

[18] The same distinctions as to place for Mass could be made respecting public oratories, provided the structure of the oratory itself admits of such distinctions as to place.—Cf. can. 1191, § 1, in reference to can. 20, in regard to this matter. As to semi-public oratories, the limits of what must be considered the place dedicated to divine worship are usually so well defined or discernible, at least by reason of the use to which adjoining places are put, that any place outside the oratory itself, with the exception of the sacristy and choir, would be simply no part of the semi-public oratory since such place would be considered another portion of e.g., the religious house or school.—Cf. Gasparri, *De SS. Euch.*, I, nn. 208, 260.

[19] "Loquendo de Iure Communi, ordinarie non nisi in Ecclesiis, vel locis consecratis aut saltem legitima authoritate benedictis, et ad cultum Divinum deputatis, licite celebrari possint Missae." — Reiffenstuel, *Ius Canonicum Universum*, III, (Venetiis, 1735), tit. XLI, n. 2. It seems that blessing of the place was not strictly necessary.—Cf. Reiffenstuel, *loc. cit.*, n. 4.

[20] Reiffenstuel, *op. cit.*, n. 3. Even before the Council of Trent Bishops had the privilege of a private oratory in their residences, in which other priests could also be permitted to offer Mass, and in which the precept of hearing Mass could be fulfilled.—Giraldi, *Expositio Iuris Pontificii*, II, (Romae, 1769), 905.

promulgation of *The Code of Canon Law,*[21] with the exception that Bishops had received the privilege of the portable altar.[22]

The following observations may be worthy of note. From time to time the question arises whether the American Bishops had or have some kind of Apostolic Indult, rather general in character, given some time in the past prior to the promulgation of the Code, in order to allow priests to offer Mass in some private home or in some other similar convenient place at mission stations. In reply one may state that under the common law of the Church as far back as the *Decretum* of Gratian (about 1140)[23] and down through the centuries[24] to our era it was the rule that Mass in private homes and similar places was forbidden;[25] however, for serious and urgent reasons, in consideration of which the Bishop could grant permission to celebrate Mass in such places, an exception to the rule was admissible as a temporary measure (*per modum actus transeuntis*).[26] Such instances, however, are represented as mere

[21] "Extra ecclesiam et oratorium Missam de regula generali celebrari non posse, ex dictis aperte apparet ... Conc. Trid. ... vetat ne Episcopi permittant Missae celebrationem extra ecclesiam et oratoria divino tantum cultui dicata." —Gasparri, *De SS. Euch.*, n. 260; Sabetti, *Compendium Theologiae Moralis,* (cited hereafter *Comp. Theol. Moral.*), (8. ed., Ratisbonae, 1892), nn. 715-716; Genicot-Salsmans, *Theologiae Moralis Institutiones,* II, (6. ed., Bruxellis, 1909), n. 244; Sabetti-Barrett, *Compendium Theologiae Moralis,* (cited *Comp. Theol. Moral.*), (22. ed., Ratisbonae, 1915), nn. 715-716.

[22] Cf. Wernz-Vidal, *Ius Canonicum,* II, *De Personis,* (ed. altera, Romae: apud Aedes Universitatis Gregorianae, 1928), n. 599, III, e, where this privilege is said to have been granted by Leo XIII on June 8, 1896.

[23] "... quia in sacris canonibus sacrificia in domibus offerri prohibita sunt."—c. 2, D. I, *de cons.* Note: this text of the *Decretum* is much older than Gratian.—Cf. Richter-Friedberg, *Decretum Magistri Gratiani,* (Editio Lipsiensis Secunda, Lipsiae, 1879), Pars II, *loc. cit.* It reflects the practice in the Church long before that time.—cf. Many, *Praelectiones de Missa,* (cited hereafter: *De Missa*), (Paris, 1903), n. 5, 3° and n. 6; S. C. Sacram., *Romana et aliarum,* 3 maii 1926.—*AAS,* XVIII (1926), 389 (*Adnotationes RR.PP. Consultorum*).

[24] Cf. Reiffenstuel, lib. III, tit. XLI, n. 3.

[25] Gasparri, *De SS. Euch.,* n. 273.

[26] Cf. e.g., Konings, *Theologia Moralis,* (cited hereafter *Theol. Moral.*), (Bostoniae, 1876), n. 1328, II; Sabetti, *Comp. Theol. Moral.,* n. 716; Smith,

exceptions under the common law; not as deriving from a concession granted under an indult.[27] Yet, "In the United States, as in other missionary countries, bishops" had "from the first the faculty of granting permission to celebrate Mass anywhere, provided it be a decent place, even in the open air or under the ground",[28] provided Mass could be offered in no other manner. This faculty was granted under an indult.[29] The faculty was lawfully communicated by Bishops to their priests, but with the limitations enjoined by the II Plenary Council of Baltimore (1866) to the effect that priests were prohibited from celebrating Mass in private houses except at mission stations and in dwellings designated by the Ordinary, or except

Elements of Ecclesiastical Law, I, *Ecclesiastical Persons,* (9. ed., New York, 1893), n. 574. These authors indicate that a much more liberal practice obtained at an earlier period, inasmuch, namely, as Bishops could grant permission to celebrate Mass outside sacred places quite at will. There seems to be no evidence that this practice was done under the approval of the common law.—cf. Reiffenstuel, lib. III, tit. XLI, n. 4, who also maintains in this place that certainly since the Council of Trent Mass could be had ordinarily only in places ". . . saltem . . . authoritate legitima ad solum cultum Divinum deputatis; prout testantibus Doctoribus . . . saepius declaravit SS. Cong. Cardin. Council. Tr. Interpretum." Also, it may appear at first glance that later, shortly prior to the promulgation of the Code, a more liberal exception to the common law, namely, ". . . ex iustis et rationabilibus causis, per modum actus . . ." was permissible.—cf. S. C. de Sacram, *Romana et aliarum,* 23 dec. 1912.—*Fontes,* n. 2107. However, it seems very correctly to have been stated that the jurisprudence of the Church did not become more liberal in granting an exception.—cf. S. C. Sacram., *Romana et aliarum,* 3 maii 1926. —*AAS,* XVIII (1926), 389, (*Adnotationes RR.PP. Consult.*). For while the S. Cong. (*Fontes,* n. 2107) did not explicitly speak of a *casus necessitatis,* or of permission to be granted only *in aliquo extraordinario casu,* it did add to the requirement of just and reasonable causes and *per modum actus* the clause: ". . . servatisque aliis de iure servandis . . ."—cf. S. C. de Sacram., *Romana et aliarum,* 23 dec. 1912.—*Fontes,* n. 2107. Hence, it is not at all evident that a more liberal exception was espoused by the Roman Curia. One is therefore not entitled to assume a departure from the traditional discipline.—cf. Can. 6, 4°.

27 Cf. Sabetti-Barrett, *Comp. Theol. Moral.,* n. 716.

28 *American Ecclesiastical Review,* II (1890), 42.

29 *Facultates quae Episcopis nostris concedi solent,* n. 23: "Celebrandi . . . sub dio et sub terra, in loco tamen decenti, . . . si aliter celebrari non possit."—cf. apud Konings, *Theol. Moral.,* p. LXXI-LXXII; Sabetti, *Comp. Theol. Moral.,* p. 833; Sabetti-Barrett, *Comp. Theol. Moral.,* p. 1085.

during the conduct of a mission in a place far removed from a church.[30] This Council also granted the following exception to its ruling:

> "Quod si Ordinarii alias concedant licentiam celebrandi in privatis aedibus ob speciales circumstantias, iis commendamus eam pro una tantum vel altera vice concedere." [31]

Therefore, in the supposition that a local Ordinary has today a similar indult, it would seem that this latter ruling is quite as much in order now as formerly. For from the tenor of such an indult one would be forced to conclude that it is not the same indult as that which is provided for in canon 1195, § 1, or its equivalent, whereby in domestic oratories [32] under the provisions there stated, one Mass may be read by Apostolic indult every day except on more solemn feast days.[33] Such an indult is one granted directly to an individual person or family, whereas the other indult is one granted for the benefit of the community as such and cannot be used in a manner equivalent to establishing a private oratory to the extent that Mass could regularly be offered there.

Under the terms of the general indult referred to in the II Plenary Council of Baltimore a priest could not use the faculty in places where there was a church.[34] Yet, it was felt at that time that perhaps Bishops could allow priests to say Mass in the rectory, even though the church was near at hand, ". . . for grave cause—v. g., when, on account of the cold in winter, it is difficult to say Mass in the church . . .".[35] One must note that this question arose in relation to the indult, not

[30] *Concilii Plenarii Baltimorensis II Acta et Decreta,* (ed. altera, Baltimorae, 1894), n. 362.

[31] *Loc. cit.*

[32] Which are erected in private houses for the benefit of some family or private person only—cf. can. 1188, § 2, 3°.

[33] This grant by way of privilege was reserved to the Holy See since the Council of Trent.—Giraldi, *Expositio Iuris Pontificii,* II, 905.

[34] Konings, *Theol. Moral.,* n. 1329, Quaer. 3°

[35] Smith, *Elements of Ecclesiastical Law,* I, n. 574, citing Kenrick as inclining to this opinion.

in relation to the common law of the Church. It seems difficult to see how such permission could be given, because the indult was not for the establishment of a private oratory where Mass could be said daily, as discussed immediately above. Whatever may have been done in such a case, the presence of this indult seems to have continued until the promulgation of the Code.[36] The Quinquennial Faculties of Ordinaries in the United States for the quinquennium 1939-1944 do not recite such a faculty.[37] It would seem that the faculty may not have been granted generally since the promulgation of the Code.[38] The Code did not revoke this indult if it was in use and existed legitimately at the time of its promulgation.[39] If a custom has been in progress of formation since the promulgation of the Code, e. g., whereby priests celebrate Mass in their rectories because of the cold of winter, there may be question as to whether this particular custom is *rationabilis* under the terms of canon 27, § 1. One must bear in mind that an Apostolic indult could be recommended by the local Ordinary on behalf of such priests.

It would appear from the discussion in the immediately previous paragraphs that an indult permitting the practice of regularly saying Mass at mission stations or outside places established according to law for divine worship would again have to be obtained from the Holy See. The brief considerations proposed in the foregoing concerning the permissibility of offering the Holy Sacrifice *extra loca sacra* by way of exception serve to emphasize the rule that according to ecclesiastical jurisprudence Mass may ordinarily not be had except

[36] Cf. Sabetti-Barrett, *Comp. Theol. Moral.*, (22 ed., 1915), p. 1085, n. 23, where this faculty is still recited as among those ". . . quae Episcopis nostris concedi solent."

[37] Cf. Bouscaren, *The Canon Law Digest,* II, (Milwaukee: The Bruce Publishing Company, 1943), 30-42. Nor did the Quinquennial Faculties immediately previous contain such a grant.—cf. Bouscaren, *The Canon Law Digest,* I. (Milwaukee: The Bruce Publishing Company, 1934), 61-72.

[38] Cf. Augustine, *A Commentary on the New Code of Canon Law,* IV, (St. Louis: B. Herder Book Co., 1920), 171.

[39] Cf. can. 4.

in places lawfully appointed for the celebration of the divine mysteries.

The rule that Mass must be said in places dedicated to God is already recited in the *Decretum* of Gratian as the received precept and practice of the Church. Mass was to be celebrated, not anywhere, but in places consecrated by the Bishop, or elsewhere with his permission,[40] or where he would order Mass to be celebrated.[41] However, the exercise of this authority of the Bishop seems definitely to have been subject to the limitations[42] of cases of great necessity:

> ". . . missarum celebrationes non alibi, quam in sacratis Domino locis absque magna necessitate fieri debere liquet omnibus . . ."[43]

or supreme necessity, in the presence of which Mass could be offered in private dwellings;[44] otherwise Mass could not be

[40] "Missarum solemnia non ubique sed in locis ab episcopo consecratis, vel ubi ipse permiserit, celebranda esse censemus."—c. 12, D. I., *de cons.* This norm seems to have been established in a particular Council of Mainz (888). —Giraldi, *Expositio Iuris Pontificii,* II, 905. However, its provision may be accepted as having received the force of universal custom.—cf. Gasparri, *De SS. Euch.,* I, n. 273, quoting Benedict XIV, *De Sacrosanctae Missae Sacrificio,* lib. III, cap. VI, n. 7; Many, *De Missa,* nn. 5, 3°; 6; 7, 2°.

[41] C. 14, D. I. *de cons.* The consent of the Bishop had to be obtained for celebrating Mass elsewhere.—*glossa* ad v. *Hic ergo. Casus,* c. 14, D. I, *de cons.* Priests who transgressed this rule were liable to what seems to be deposition: "Nullus presbyter Missas celebrare praesumat, nisi in sacratis ab Episcopo locis, qui sui particeps de cetero voluerit esse sacerdotii"—c. 15, D. I, *de cons.,* the *Summarium* or subscription of which canon in the *Decretum* declares: "Abiiciantur sacerdotes qui in locis non sacratis Missas celebrare praesumunt"; or excommunication.—c. 35, D. I, *de cons.* However, it may here be noted that the *Decretum Gratiani* was never approved by the Church as an authentic Code of law.—Van Hove, *Commentarium Lovaniense in Codicem Iuris Canonici,* Vol. I, Tom. I, *Prolegomena,* (Mechliniae-Romae: H. Dessain, 1928), n. 191.

[42] Rufinus, *Summa Decretorum,* (Herausgegeben von Dr. Heinrich Singer, Paderborn, 1902), p. 542.

[43] C. 1, D. I, *de cons;* Reiffenstuel, lib. III, tit. XLI, n. 4.

[44] "Et hoc si summa necessitas agere compulerit, non in domibus offerre prohibita sunt (quia in sacris canonibus sacrificia in domibus offerri prohibita sunt) sed in tabernaculis divinis precibus a pontificibus dicatis . . . pro

had in such places. It was considered the right and proper procedure not to have Mass at all if it could not be offered in the appointed place dedicated to divine worship.[45] In case of necessity in this regard the principle was applied to the effect that "necessity knows no law", so that what is otherwise unlawful under human law becomes lawful by force of necessity,[46] as the gloss of the *Decretum* in the place just cited [47] points out, appealing to the respective rule of law in the Decretals of Gregory IX.[48] Mass in a domestic oratory was admissible under given circumstances by permission of the Bishop;[49] namely, if there was difficulty for the family to reach the distant parish church by reason of an arduous journey or similar circumstance, Mass could be celebrated in its domestic oratory on minor feast days, certain major and special feasts excepted.[50] Briefly, the point here to be emphasized is that according to the received practice of the Church the rule obtained that Mass was to be had only in places dedicated to divine worship.[51] A departure from this rule was considered an

summa, ut praefixum est, necessitate et non pro libito . . ."—c. 2, D. I, *de cons.* The ancient jurisprudence of the Church is revealed in this place of the *Decretum* together with its gloss. For it was felt that if in the Old Testament the Hebrews had their appointed places of worship especially dedicated to God, such should be by a greater right the practice in the Christian era, so that Holy Mass could not be had in any place at large, except in case of necessity.—cf. *glossa* ad v. *Tabernaculum. Casus,* c. 2, D. I. *de cons.*

[45] C. 11, 30, D. I, *de cons.*

[46] "Satius ergo est missam non cantare aut non audire, quam in illis locis, ubi fieri non oportet: nisi pro summa contingat necessitate: quoniam necessitas legem non habet."—c. 11, D. I, *de cons; glossa* ad v. *Necessitas, loc. cit.:* "Idest, non est subiecta humanae constitutioni, immo excusat quod contra eam fit."

[47] C. 11, D. I, *de cons., glossa* ad v. *Necessitas.*

[48] "Propter necessitatem illicitum efficitur licitum. (Idem: Quod non est licitum lege, necessitas facit licitum . . .)"—R. J. 4, *De Regulis Iuris in X.*

[49] Cf. *glossa* ad v. *Necessitas,* c. 11, D. I, *de cons; glossa* ad v. *In capellis,* c. 30, D. I, *de cons;* c. 33, D. I, *de cons.,* cum *glossa* ad v. *Non licet, ibid.*

[50] C. 35, D. I, *de cons.,* cum *glossa* ad v. *Si quis etiam, Casus;* ad v. *Oratorium;* ad v. *Propter fatigationem.* But see can. 1195.

[51] Cf. S. C. de Sacram., *Litterae ad Rev.mos Ordinarios Italiae,* 22 iulii 1924.—*AAS,* XVI (1924), 370; S. C. de Sacram., *Romana et aliarum,* 3 maii, 1926.—*AAS,* XVIII (1926), 389.

exception, which exception was admissible because of necessity.[52] The expressions, *magna necessitate,*[53] *summa necessitate,*[54] *urgentis necessitatis,*[55] or simply *tempore necessitatis,*[56] *causa necessitatis, eventus necessitatis,* or *necessitas*[57] were all used to express the situation which endorsed offering Mass by way of exception outside places dedicated to divine worship. The Council of Trent simply reflected and emphasized in its prohibition of Mass outside these places[58] the rule which had been traditional in the Church. This rule was incorporated in canon 822, § 1 of *The Code of Canon Law.*[59] Hence, the law of canon 822, § 4, which makes provision for the permissibility of having Mass outside a church or oratory, which are the places set aside for divine worship,[60] is juridically a law which is an exception to a law and must therefore be interpreted strictly.[61] Thus the Pontifical Commission for the Interpretation of the Code gave a response in the *affirmative* to the question: Whether the faculty of celebrating Mass in a private dwelling must be interpreted restrictively by the Ordinary, according to the norm of canon 822, § 4.[62] Moreover, the norms of canon 6, 2° and 3° direct that the legal provisions of the Code which restate pre-Code law must be interpreted according to pre-Code jurisprudence; the same obtains when

[52] *Glossa* ad v. *Sicut non;* ad v. *Casus;* ad v. *Licet,* c. 11, D. I, *de cons.;* Rufinus, *Summa Decretorum,* p. 542; Reiffenstuel, lib. III, tit. XLI, n. 4.

[53] C. 1, D. I, *de cons;* Reiffenstuel, lib. III, tit. XLI, n. 12.

[54] Cf. e.g., c. 2, 11, D. I, *de cons;* Rufinus, *Summa Decretorum,* p. 542.

[55] Reiffenstuel, lib. III, tit. XLI, n. 4.

[56] *Glossa* ad v. *Sicut non,* c. 11, D. I, *de cons.*

[57] *Glossa* ad v. *Casus;* ad v. *Necessitas,* c. 11, D. I, *de cons;* Rufinus, *Summa Decretorum,* p. 545.

[58] Conc. Trident., sess. XXII, *de observandis et evitandis in celebratione Missae.*

[59] Cf. S. C. de Sacram., *Romana et aliarum,* 3 maii 1926.—*AAS,* XVIII (1926), 389.

[60] Cann. 1161, 1188, § 1.

[61] Can. 19.

[62] *AAS,* XI (1919), 478.

there is doubt concerning a discrepancy between pre-Code law and the provisions of the Code.[63] Accordingly, the point under consideration here is whether the stipulations recited in canon 822, § 4 as necessary to allow the Ordinary to grant an exception to the law that Mass must be offered in a sacred place reflect pre-Code law as understood by pre-Code jurisprudence. If so, these provisions of canon 822, § 4 must be understood in the light of pre-Code juristic doctrine.

It has just been pointed out in the foregoing that pre-Code law prior to the Council of Trent admitted an exception to the law of celebrating Mass in places dedicated exclusively to divine worship. While it emphasized this rule of law, the Council of Trent was not considered as having set aside the permissibility of an exception in case of necessity, which existed until that time,[64] and which had been received into the body of ecclesiastical jurisprudence.[65] Moreover, it was a well-founded common teaching among the jurists that such exception in a case of what might be called imminent necessity, as in times of pestilence, war, destruction of the church by fire, could be employed without the permission of the Bishop, especially if he could not be reached.[66] Since, as will appear at the close of this discussion, the provisions of canon 822, § 4 here considered are a re-statement of pre-Code law and jurisprudence, the same rule would be admissible under the law of the Code. But when there was no case of necessity, an indult from the Holy See was required;[67] this norm also obtains today.

[63] Can. 6, 4°.

[64] Gasparri, *De SS. Euch.*, I, n. 273.

[65] Many, *De Missa*, nn. 5, 30°; 6.

[66] Reiffenstuel, lib. III, tit. XLI, n. 13; S. Alphonsus, *Theologia Moralis* (cited *Theol. Moral.*), VI, (Mechliniae, 1852), nn. 356, 359; Gury, *Compendium Theologiae Moralis* (cited *Comp. Theol. Moral.*), (Ratisbonae, 1874), Pars. II, n. 386, III; thus Cappello, (*Tractatus Canonico-Moralis De Sacramentis*, I, [Romae: Marietti, 1938], n. 752, 22), adopts this interpretation for the law of the Code.

[67] Reiffenstuel, lib. III, tit. XLI, n. 4; Giraldi, *Expositio Iuris Pontificii*, II, 905.

Pre-Code law contemplated a case of necessity as the basis for the exception under discussion. The law of the Code will admit an exception to the ordinary rule for the place of celebrating Mass only for a just and reasonable cause in some extraordinary case and as a temporary measure (*per modum actus*).[68] The precise question therefore is as to the nature of the "case of necessity" contemplated in pre-Code law in relation to the requirements of canon 822, § 4 just mentioned.

First of all, it is certain that the term "necessity", used consistently and universally in pre-Code jurisprudence in treating of the present matter, admitted of variant degrees of necessity by force of custom.[69] One may conjure up a multitude of situations which may be called cases of necessity, as appears from the body of commentary on the pre-Code law. Thus cases of necessity were considered: the destruction of sacred places by fire or by other means,[70] such as earthquake,[71] in which circumstances the faithful would be without Mass,[72] unless it could be celebrated elsewhere; times of war and persecution, when people could not assemble in church without serious danger;[73] occupation of places of worship by the enemy;[74] occasions of epidemic,[75] when people were confined to places of isolation to hinder contagion and for the purposes of observation and cure;[76] soldiers in encampment,[77] distant from

[68] "Loci Ordinarius aut, si agatur de domo religionis exemptae, Superior maior, licentiam celebrandi extra ecclesiam et oratorium . . . concedere potest iusta tantum ac rationabili de causa, in aliquo extraordinario casu et per modum actus."—can. 822, § 4.

[69] Cf. Reiffenstuel, lib. III, tit. XLI, n. 15; S. Alphonsus, *Theol. Moral.*, VI, n. 356, citing many authorities.

[70] C. 30, D. I, *de cons;* Rufinus, *Summa Decretorum*, p. 545; Reiffenstuel, lib. III, tit. XLI, n. 13.

[71] Gasparri, *De SS. Euch.*, I, n. 276.

[72] S. Alphonsus, *Theol. Moral.*, VI, n. 356.

[73] Reiffenstuel, lib. III, tit. XLI, n. 13.

[74] Gasparri, *De SS. Euch.*, I, n. 276.

[75] Reiffenstuel, lib. III, tit. XLI, n. 13; S. C. de Prop. Fide, decr., 30 apr. 1753, ad 2.—*Fontes*, n. 4517.

[76] Gasparri, *De SS. Euch.*, I, n. 276; Many, *De Missa*, n. 6.

[77] Reiffenstuel, lib. III, tit. XLI, n. 13; Many, *De Missa*, n. 6.

church [78] on holy days of obligation;[79] a large gathering of people,[80] but only on the occasion of solemn feast days [81] when the capacity of the church was too small;[82] people on distant [83] journeys where there was no church;[84] the benefit of passengers in a port, when they could not easily attend Mass elsewhere before or after a sea voyage,[85] on a holy day of obligation.[86]

A general review of these cases reveals that they involved or implied the presence of an appreciable number of people.[87] The cases represent, without doubt, extraordinary situations. Hence, there is no question that such cases would fulfill the requirement of canon 822, § 4 of "some extraordinary case" (*in aliquo extraordinario casu*) in the sense of event or happening, for such is the common denominator of all these instances. Another element common to them is the fact that a church or appointed place of worship is either *physically* absent or *morally* absent,[88] that is, reasonably inaccessible. However, the consideration of an extraordinary event alone did not complete the concept of the "case of necessity" according to pre-Code jurisprudence. Such events exemplified one element of the "case of necessity".

[78] Gasparri, *De SS. Euch.*, I, n. 276. It may here be noted that the faculties of military chaplains to say Mass in camp do not affect the use of the Bishop's faculty to permit Mass outside sacred places.—cf. Many, *De Missa*, n. 6, nota 1.

[79] S. Alphonsus, *Theol. Moral.*, VI, n. 356.

[80] Gasparri, *De SS. Euch.*, I, 276.

[81] S. Alphonsus, *Theol. Moral.*, VI, n. 356, citing many authorities for this opinion; cf. Many, *De Missa*, n. 6.

[82] Reiffenstuel, lib. III, tit. XLI, n. 13.

[83] Reiffenstuel, lib. III, tit. XLI, n. 13.

[84] C. 30, D. I, *de cons*; Rufinus, *Summa Decretorum*, p. 545; Gasparri, *De SS. Euch.*, I, n. 276; Many, *De Missa*, n. 6, 1°, d.

[85] Many, *De Missa*, n. 6, 2°.

[86] S. Alphonsus, *Theol. Moral.*, VI, n. 356.

[87] Cf. Many, *De Missa*, n. 6, 1°.

[88] Many, *De Missa*, n. 6.

The obligation of attending Mass on holy days of obligation was also deemed an integral or contributing factor in creating the case of necessity to permit Mass outside sacred places.[89] Thus, there was considered no difficult in allowing such celebration of Mass on these days[90] in case of necessity, that is, in the instance when a considerable number (*multitudo quaedam*) of the faithful, who were obliged to attend Mass, would be without Mass unless its celebration were permitted outside a church or oratory.[91] It would be a mistake, however, to maintain that pre-Code jurisprudence required the fulfillment of the obligation of hearing Mass as an essential note in the concept of a case of necessity. On the contrary, exclusive of the obligation of hearing Mass there were other concrete situations considered as sufficient occasions on which Mass "had to be said" outside sacred places.[92] In other words, this norm of the obligation to hear Mass, which may to some extent have regulated, so to speak, the presence of the exception, did itself allow of notable exceptions. It was, therefore, not at all accepted as to the doctrine of pre-Code jurisprudence that the case of necessity had to occur on a holy day of obligation.[93] For instance, when a certain number of the faithful were detained on a journey or at camp for a long time without Mass, which Mass could, however, be celebrated on a weekday, it was thought good and equitable to provide such people with a Mass for their spiritual aid and solace, especially if they would subsequently for a number of days be without Mass.[94] It may

[89] S. C. de Prop. Fide, decr., 30 apr. 1753, ad 4.—*Fontes*, n. 4517. "Porro in relatis necessitatis casibus Missae celebratio extra Ecclesiam et oratorium publicum permitti non potest nisi diebus festis, cum in diebus ferialibus necessitas assistendi Missae non adsit."—Gasparri, *De SS. Euch.*, I, n. 278; where other authorities for this opinion are also cited. Cf. etiam, *op. cit.*, n. 274.

[90] Many, *De Missa*, n. 6.

[91] Wernz, *Ius Decretalium*, III, (Romae, 1901), n. 544.

[92] Cf. Gasparri, *De SS. Euch.*, I, n. 273, quoting Benedict XIV, *De Sacrosanctae Missae Sacrificio*, lib. III, cap. VI, n. 7.

[93] Cf. Many, *De Missa*, n. 6, 2°.

[94] "Sed huic regulae generali nonnullae sunt exceptiones. Ita si plures fideles sive in itinere sive in castris Missa diu caruerunt, quae die feriali celebrari

be noted in passing that there was no stipulation made to the effect that, e. g., the journey in question had to be a matter of necessity. The obligation of attending Mass was not, therefore, the exclusive factor determining the lawfulness of the exception, supposing, of course, that the extraordinary occurrence was at hand. This determining factor embraced a wider scope, namely, the spiritual good to be derived from the Mass, and which spiritual good the welfare of the faithful could reasonably be thought to demand and be amenable to by virtue of a moral necessity or need or exigency on their part. This consideration is borne out, as already insinuated in the immediately foregoing example, by the fact that it was the common teaching of juristic thought employed in general practice that Mass was permissible outside sacred places on weekdays at the inception of a dangerous or after a long voyage, or before going to war,[95] or after a notable victory in battle.[96] It must be pointed out that these instances were stated merely by way of example. When, therefore, very shortly before the promulgation of the Code the Holy See declared that Ordinaries for just and reasonable causes, and provided other matters demanded by law were fulfilled, could permit the celebration of Mass in a home *per modum actus on any day*,[97] it did not evidence a mitigation in the jurisprudence on this matter, because this pronouncement of the Holy See had its basis in ecclesiastical jurisprudence existing long before this declaration was made.[98] Accordingly, the interpretation of canon 822, § 4 in this particular must follow the common pre-Code

potest, aequum est ut spirituale Missarum subsidium et solatium eisdem die feriali praebeatur, praesertim si deinde Missae per plures dies assistere non possunt."—Gasparri, *De SS. Euch.*, I, n. 278.

[95] Many, *De Missa*, n. 6, 2°.

[96] Gasparri, *De SS. Euch.*, I, n. 278.

[97] "I. An Ordinarii ex iustis et rationabilibus causis, servatisque de iure servandis, permittere possint per modum actus celebrationem Missae, domi, quocumque die. Ad I. Affirmative."—S. C. de Sacram., *Meliten.*, 22 mart. 1915.—*Fontes*, n. 2110.

[98] Cf. Many, *De Missa*, n. 6, 2°.

juristic doctrine;[99] moreover, can. 822, § 4 itself is silent as to any particular day on which Mass may be permitted, whereas Mass in a domestic oratory is expressly prohibited on more solemn feast days, except for certain reasons.[100]

Thus, aside from the obligation of attending Mass, the amenability to seriously needed spiritual benefit on the part of the faithful seemed to have been the chief consideration in the question of permitting Mass in the presence of some extraordinary event or occurrence. This statement seems to have further corroboration in the fact that daily Mass was considered permissible in the army general's tent in the time of war.[101] Similarly, Reiffenstuel seriously entertains at length the question whether Mass could be permitted in the private dwelling of an infirm person, as a source of solace to him.[102] He leaves the solution of this particular question in doubt, but there is no mistaking that Mass as a source of consolation to the patient was to this eminent author a serious consideration in relation to permitting Mass in a private home. One is inclined to conjecture in reading his text that Reiffenstuel in his doubt concerning this case was seeking an extraordinary occasion with which to couple the cause or reason of spiritual benefit accruing to the infirm by his assisting at Mass. Hence, he constructs the same situation in the case of a nobleman who is ill or some similar occurrence. He again leaves the solution of the case in doubt, but cites authors of note who would answer in the affirmative if custom allowed the Bishop to dispense from the law of saying Mass in church in such a case.[103] The Holy See forbade Mass in private dwellings in cases of individual illness, lest the Holy Sacrifice should suffer irrever-

[99] Cf. Many, *loc. cit.;* cann. 6, 2°; 18.

[100] Cf. can. 1195.

[101] Gasparri, *De SS. Euch.*, I, n. 278, where this author cites Gattico, (*De usu altaris portatilis*, cap. IX, n. 11) as sponsoring this opinion.

[102] *Ius Canonicum Universum*, lib. III, tit. XLI, n. 14-15.

[103] *Op. cit.*, n. 15.

ence,[104] while it apparently did not challenge the worthiness of the cause or reason, namely, the spiritual consolation or benefit of the infirm. On the other hand, the Holy See, though it did not recognize the lawfulness of having Mass in the dwelling of an infirm person for the reason of devotion (*ex devotione*), did declare that Mass was permissible because of necessity (*ex necessitate*).[105] Accordingly, the practice was unequivocally endorsed as permissible to have Mass in a decent place in the home of a person in danger of death if Viaticum could not be brought to him from church,[106] and likewise to offer Mass if the faithful could not otherwise fulfill the paschal precept.[107] Finally an opinion of considerable authority permitted the celebration of Mass outside of church by one journeying through isolated regions, who would otherwise be forced under those conditions to be without Mass.[108] There is no question, of course, that today a petition by the priest for the indult of a portable altar would be in order in view of such conditions on a distant journey.

The cases presented in the foregoing paragraphs seem to permit the following generalization. The case of necessity in relation to permitting Mass to be celebrated outside of sacred places is to be understood and estimated in the sense of *moral necessity*.[109] This moral necessity derived according to pre-Code jurisprudence either from the obligation to attend Mass

[104] "Prohibet [i. e., S. Congregatio] celebrari Missas in aedibus privatis, etiam ex causa infirmitatis, cum minus incongruum sit infirmos sine Missa persistere, quam quod sacrosanctum Sacrificium ex indecentia iniuria patiatur." —S. C. de Prop. Fide, decr., 30 apr. 1753, ad 3.—*Fontes*, n. 4517.

[105] S. C. de Prop. Fide, 17 aprilis 1758 (C. G.).—*Collectanea S. Congregationis de Propaganda Fide*, I, (Romae, 1907), n. 411.

[106] S. C. de Prop. Fide, 14 dec. 1668.—*Fontes*, n. 4480; Benedictus XIV, decr., "*Inter omnigenas*", 2 febr. 1744, § 22.—*Fontes*, n. 339; S. C. de Prop. Fide, instr. (ad Ep. Scodren.), 11 sept. 1779.—*Fontes*, n. 4581.

[107] S. C. de Prop. Fide, (C. P. pro Sin.—Sutchuen.), 6 sept. 1821.—*Fontes*, n. 4726.

[108] Cf. S. Alphonsus, *Theol. Moral.*, VI, n. 356, where this author names many authorities of note as favoring this opinion.

[109] Cf. etiam *AAS*, XVIII (1926), 389, (*Adnotationes RR.PP. Consultorum*).

or from the consideration that appreciable spiritual benefit or solace would accrue by hearing Mass. For in the presence of an extraordinary event coupled with a serious reason,[110] e. g., with the obligation to attend Mass on a holy day, the Ordinary could permit several celebrations of Mass outside of church, according to the demands of a great number of people.[111] And again, in a similar situation the Ordinary could permit Mass on a weekday when certain grave circumstances rendered its celebration *in a sense* necessary;[112] for instance, an occasion when people were on a journey provided a case in which an exception to the rule could be made.[113]

The point to be noted here as the common element in relation to all these cases and similar ones is, namely, that the mind of the Church was deemed as favorably inclined to the celebration of Mass outside sacred places when it could reasonably be expected that the spiritual welfare of the faithful would be appreciably promoted thereby. In other words, the exigencies of the spiritual good of the faithful is the *just cause* referred to in canon 822, § 4. Pre-Code jurisprudence seems to reveal no other just cause. Hence, in doubt as to the meaning of *just cause* in the canon cited one may not depart from pre-Code jurisprudence.[114] Consequently, it is correctly said that the only just and reasonable cause for permitting Mass in the conditions under discussion is that which must be moti-

[110] Cf. *AAS*, XVIII (1926), 389, (*Adnotationes RR.PP. Consultorum*).

[111] Gasparri, *De SS. Euch.*, I, n. 278.

[112] "Attamen, ex communi doctrina et ex usu, permittere potest [i.e., Episcopus] etiam his diebus [i.e., ferialibus], quando gravia quaedam adiuncta missae celebrationem reddunt aliquo modo necessariam, v.g., ante periculosam vel post longam navigationem, ante imminens praelium, etc."—Many, *De Missa*, n. 6, 2°.

[113] "Benedictus XIV, *De sacros. Missae sacrificio*, lib. III, cap. VI, n. 7, haec habet: 'Lex quae prohibet ne quis Missam alibi celebret quam in templis aut oratoriis publicis privatisque, praecipuam quamdam restrictionem habet, si Missa quae omnino celebranda sit, non possit in huius modi locis celebrari; namque eo in casu licet sacrificium ubique facere . . . iuxta can. *Concedimus*, dist. I, *De consecr.*, In itinere vero positis, si ecclesia defuerit, sub dio, seu tentoriis . . .'"—Gasparri, *De SS. Euch.*, I, n. 273.

[114] Cf. can. 6, 4°.

vated only by the highest purpose of divine worship and the spiritual good of the faithful,[115] which, after all, is the inherent purpose of Mass at any time,[116] and the only truly worthy motive.

The pre-Code law described above, whereby Bishops were empowered to grant permission to have Mass *extra loca sacra* was considered as a faculty to grant a dispensation.[117] The provisions of canon 822, § 4 discussed in the foregoing are the same as the corresponding provisions of the pre-Code law.[118] Therefore the faculty of the Ordinary in canon 822, § 4 must likewise be considered as a faculty to dispense.[119] That the power of the Ordinary in canon 822, § 4 is a faculty to grant a dispensation is clear from the fact that he can thereby relax the law of canon 822, § 1 in a specific case, which act is that of dispensing.[120]

To dispense from ecclesiastical law there is required a just and reasonable cause, consideration being taken of the gravity, or importance, of the law from which a dispensation is granted;[121] otherwise the dispensation granted by an inferior is unlawful and invalid,[122] that is, the dispensation must be considered as not having taken effect.[123] The one who dispenses must have a just reason, such that it is in due proportion to the gravity of the law to be relaxed. The cause must

[115] S. C. de Sacram., *Litterae ad Rev.mos Ordinarios Italiae,* 26 iulii 1924.—*AAS*, XVI (1924), 370.

[116] Cf. Pius XII, litt. encycl., "*Mystici Corporis Christi*", 29 iunii 1943.—*AAS*, XXXV (1943), 232-233.

[117] Reiffenstuel, lib. III, tit. XLI, nn. 14-15; S. Alphonsus, *Theol. Moral.*, VI, n. 359, who cites many authorities of note on behalf of this doctrine.

[118] C. S. C. de Sacram., *Litterae ad Rev.mos Ordinarios Italiae,* 26 iulii 1924.—*AAS*, XVI (1924), 385; *AAS*, XVIII (1926), 389, (*Adnotationes RR.PP. Consultorum*).

[119] Cf. can. 6, 2°, 3°, 4°.

[120] Cf. can. 80.

[121] Can. 84, § 1.

[122] Cf. *can. cit.*

[123] Can. 11.

also be reasonable; that is, in accordance with prudence, equity, and practical conditions.[124] The gravity of a law depends not only upon the subject matter of the law itself, but also upon the reason of the law inasmuch as this reason may demand the application of the law more or less urgently considering the varying concrete circumstances of time, place, conditions, e. g., danger of scandal, in the presence of which the dispensation in a particular case is requested, all of which are to be weighed in the prudent judgment of the superior.[125] One may, for instance, suppose a case wherein the cause for dispensation is in itself entirely justifiable, that is, just, in due proportion to the subject matter of the law considered in itself. Yet, it may be highly imprudent and improper for the superior to grant the dispensation by reason of the concrete circumstances of time, place, practical conditions. For example, in certain parts of Germany the Church had tolerated for a very long time the use of the same church for Catholic and protestant services—a practice which, Wernz points out, is foreign to the mind of the Church and should be tolerated "*. . . ad summum ad tempus propter tristem necessitatem . . .*" But Pius IX would not tolerate such a practice in conjunction with the neo-heretics known as Old Catholics even though the churches were originally Catholic churches.[126] One may suppose the reason of the difference in ecclesiastical discipline to have been the particular revulsion of the Church toward the new heretical sect and its tenets.[127] In this connection it may be pointed out that canon 823, § 1 prohibits the celebration of Mass in protestant and schismatic churches, even though these

[124] Cicognani, *Canon Law* (2. ed., Authorized English translation, O'Hara-Brennan, Philadelphia: The Dolphin Press, 1935), p. 852.

[125] Cf. Van Hove, *Commentarium Lovaniense in Codicem Iuris Canonici,* Vol. I, Tom. V, *De Privilegiis, De Dispensationibus,* (cited hereafter as *De Privil. et Dispens.*) (Mechliniae-Romae: H. Dessain, 1939), n. 454.

[126] *Ius Decretalium,* III, n. 447, Scholion.

[127] This sect rejected the dogma of papal infallibility and was characterized by ecclesiastical liberalism and insubordination to the teachings of the Church.—Cf. *The Catholic Encyclopedia,* Vol. XI, s. v. "*Old Catholics.*"

had formerly been properly consecrated or blessed. Yet, it seems that the doctrine of Wernz mentioned above may still be applied if there is absolutely no danger of scandal.[128]

The fact of a large gathering of people on the occasion of some profane celebration does not itself constitute a just and reasonable cause under the provisions of canon 822, § 4, to permit the offering of Mass by way of exception to canon 822, § 1; also, Mass could certainly not be employed to add solemnity to or enhance a celebration of political character.[129] It may be granted that such occasions are extraordinary, but they are not thereby occasions on which the exigencies of the spiritual welfare of the faithful demand, morally speaking, an exception to the law of having Mass in a sacred place. The jurisprudence of the Church has confined the use of such exceptions to extraordinary events in which the reasons accompanying such occurrences are exclusively religious.[130] In other words, on the occasion of such particular celebrations as just mentioned the just and reasonable cause required is, or must at least be presumed to be, absent. Also one may note that Mass may not be made subservient to enhance profane

128 "Solum in casu necessitatis, si prorsus scandalum absit, illa celebratio (i.e., in templo haereticorum vel schismaticorum) licita fieri potest."—Wernz-Vidal, *Ius Canonicum,* Tom, IV, *De Rebus,* (Romae: apud Aedes Universitatis Gregorianae, 1934), n. 96; Cappello, *Tractatus Canonico-Moralis De Sacramentis,* I, n. 754, 2, agrees. Vermeersch-Creusen reject this opinion with regard to Mass in churches of oriental schismatics which were formerly Catholic churches; otherwise they agree with the above opinion in stating that such a practice could be tolerated to some extent because of cogent necessity.—*Epitome Iuris Canonici,* II, n. 102. One is inclined to question the distinction made by these authors between the use of oriental schismatic churches and those of other schismatics and of heretics. The Code does not make this distinction; *ubi legislator non distinguit neque nos distinguere debemus* is a good principle of interpretation.

129 S. C. de Sacram., *Litterae ad Rev.mos Ordinarios Italiae,* 26 iulii 1924.—*AAS,* XVI (1924), 370.

130 "Ma a chi la [i.e., la disciplina ecclesiastica in questa materia] studia nella sua evoluzione, apparisce chiaramente che, se alcune volte fu concessa la celebrazione del divin Sacrificio fuori delle chiese, ciò fu sempre ristretto ai casi di necessità o per motivi esclusivamente religiosi."—S. C. de Sacram., *Litterae ad Rev.mos Ordinarios Italiae,* 26 iulii 1924.—*AAS,* XVI (1924), 370.

gatherings. In such a situation the requirement of a just and reasonable cause would certainly be absent. For the norms of canon 822, §§ 1 and 4 are of a serious nature, inasmuch as they are calculated to elevate and purify the religious sense of the faithful,[131] and to prevent the sacred ceremonies of the church from becoming laicized.[132] Hence, the wording of canon 822, § 4, "...iusta tantum ac rationabili de causa..." must be understood as a cause which has relation exclusively to divine worship and the spiritual good of the faithful.[133]

A certain appreciable number (*multitudo quaedam*) of people is required to permit Mass outside sacred places,[134] which statement reflects the ordinary rule in this matter. But the distinction between *many,* whose spiritual wants would permit the use of canon 822, § 4, and *few,* is left to the prudent judgment of the Ordinary,[135] with whom rests the regulation of this matter.[136] One may recall in passing that when there is doubt as to the sufficiency of cause in connection with some extraordinary event, the Ordinary may licitly and validly dispense,[137] and also where there is a doubt of fact;[138] extraordinary events are matters of fact.

That the matter of the number of people is not in itself the paramount consideration in the question of granting permis-

[131] "Giova poi inculcare et practicare con la debita severità queste norme disciplinari [i. e., dal can. 822] per elevare e purificare il sentimento religioso del popolo."—*AAS,* XVI (1924), 370.

[132] *AAS,* XVIII (1926), 388, (*Adnotationes,* n. 4).

[133] *Ius Pontificium,* IV (1924), 117.

[134] Wernz, *Ius Decretalium,* III, n. 544.

[135] Gasparri, *De SS. Euch.,* n. 274, who cites Gattico, *De usu altaris portatilis,* cap. IX, n. 6, seq., as also sponsoring this statement.

[136] Cf. S. C. de Prop. Fide, (C. G.—Constantinop.), 18 nov. 1765.—*Fontes,* n. 4547, where two other decrees to the same effect are cited.

[137] Can. 84, § 2.

[138] Can. 15. In this particular matter the remark of Van Hove, (*De Legibus, Ecclesiasticis,* n. 231), seems apt: "Dubium enim facti ad dubium iuris saepe reduci potest, quo facto exsistentia obligationis vi principii probabilismi saepe negari poterit aut usu can. 15 tolletur."

sion to celebrate Mass outside sacred places seems evidenced by certain pronouncements of the Sacred Congregation of the Sacraments. Accordingly, the situation of parishes of large territorial extent, in which hamlets or homes where the faithful dwell are scattered over the territory far from the parish church (*pagi vel domus in agro disseminatae, procul a paroeciali ecclesia distant*), forms the basis in consideration of which, along with the requirements of canon 822, § 4, the Ordinary may see fit in the absence of a sacred place to allow the celebration of Mass in a decent place, e. g., a large room of a house, properly appointed after the manner of an oratory (*in loco non sacro, etsi honesto et decenti, qualis esset, e. g., conclave alicuius domus instar oratorii decenter ornatum*).[139] One may here note that the question of number of people is not mentioned; and especially to be remarked is the fact that the entire matter is left to the judgment of the Ordinary, in accord, of course, with canon 822, § 4. A similar situation in our own times may suggest itself, namely, in which, e. g., in some part of our country there occurs, because of national or local emergency of any kind, or because of some other unusual event, a sudden influx of people to a place distant from church, among whom there are Catholics. The western boom town or some similar occurrence brings a concrete example to mind.

Again, it is ordinarily not permissible under the provisions of canon 822, § 4 to celebrate Mass outside sacred places at the home of a deceased person, even in the presence of the body of the deceased, for usually there is no concurrence of a just and reasonable cause together with an extraordinary event.[140] Both of these elements, however, are considered present at the demise of the residential Bishop, or local Ordinary; of a member of the first family; of a person otherwise distinguished, who, namely has merited well of, or has been a

[139] S. C. de Sacram., *Montis Regalis in Pedemonte,* 5 ian. 1928.—*AAS,* XX (1928), 80, (*Adnotationes,* [D. Jorio, Secretarius]).

[140] S. C. de Sacram., *Romana et aliarum,* 3 maii 1926, ad I.—*AAS,* XVIII (1926), 388.

benefactor to, the Church or State, or has been extraordinarily generous toward the cause of the poor and needy; at the death of a person who has received an Apostolic privilege to this effect.[141] It would seem that an extraordinary occurrence or instance similar to the foregoing examples could well be present even where the locality is small. Such would certainly obtain at the death of any residential Bishop or local Ordinary. The pre-eminence of a layman or his extraordinary merits on behalf of the Church or civil society would seem to allow of a relative interpretation. The foregoing are expository examples in which exceptions are made in the case of individuals. Accordingly, the illness of a priest or his parent would not constitute an extraordinary event. However, if this occurrence would be coupled with, e. g., some special anniversary, there may be sufficient grounds for the application of canon 822, § 4.[142] The present example suggests the case of a newly ordained priest who could thus be permitted to celebrate Mass at his home (*nunquam autem in cubiculo*) [143] for his parent who is bedridden.[144]

There is one last item among the provisions of canon 822, § 4 which needs attention in the present discussion; namely, that Mass may be permitted *per modum actus*. At the outset it

[141] Such exceptions are nevertheless subject to the following provisions: "...dummodo cadaveris expositio fiat servato debito decore, ac in eodem loco nihil adsit quod sit alienum a sanctitate divini Sacrificii; ...dummodo semper debitae exsequiae expleantur in ecclesia. Tunc Ordinarius permittere poterit unius aut alterius Missae sed non plus quam trium Missarum celebrationem, ..."—*Codicis Iuris Canonici Interpretationes Authenticae seu Responsa, Romanorum Pontificum Actis et R. Curiae Decisionibus Aucta,* (a Ioseph Bruno collecta), (Typis Polyglottis Vaticanis, 1935), p. 84, nota 2; S. C. Sacram., *Romana et aliarum,* 3 maii 1926, ad II et III.—*AAS,* XVIII (1926), 388.

[142] Cf. Vermeersch-Creusen, *Epitome Iuris Canonici,* II, n. 99.

[143] "Cubiculum," says Konings (*Theol. Moral.,* n. 1329, *Quaer.* 3°), is the place ". . . ubi aegrotus decumbit . . . ubi aliqui dormire *consueverunt* . . ."; "...in cubiculo idest; in camera de facto destinata cubitum ire ..."—Blat, *Comment. Text. C.I.C.,* III, *De Rebus,* n. 134, *in fine.*

[144] Cf. S. Alphonsus, *Theol. Moral.,* VI, n. 359, *in medio,* who recites a substantially similar case.

may be noted that all the cases considered in the foregoing have the note of singularity coupled with the presence of the just and reasonable cause described above. It seems, therefore, that it is the intent of the law to allow Mass as long as singular events or occurrences continue [145] but no longer; provided, too, that the just and reasonable cause also continues,[146] so that if either one of these two elements ceases to exist, the "case of necessity" is no longer present. Hence, in this latter event there would be no further sufficient grounds to admit the exception to the law that Mass must be celebrated in a sacred place. It may also be observed that singular occurrences are no longer extraordinary if they continue to exist indefinitely, and that the law of canon 822, § 1 comes into force when the extraordinary character of an event is no longer present. The implication, therefore, would seem to be that during the continuance of the occurrence, if it continues, a sacred place should be prepared in due time. Thus the *Decretum* of Gratian records the permissibility of having Mass outside of churches destroyed by fire for such time until they could be placed in the state of repair (*donec ecclesiae restaurari queant*),[147] which was expected to be accomplished as soon as possible.[148] On the other hand, some extraordinary occurrences are by their very existence temporary. Hence, one may rightly conclude that *per modum actus,* considering the very

[145] St. Alphonsus, describing the extent of the Bishop's power to dispense concerning the law of having Mass in sacred places, says: "...nam prohibitio dispensandi est strictae interpretationis, ac intelligenda est (ut superius vidimus) tantum pro dispensationibus continuo permanentibus, non vero pro iis, quae ad tempus conceduntur respectu alicuius causae transeuntis."—*Theol. Moral.,* VI, n. 359, *in medio.*

[146] "Dispensatio quae habet tractum successivum, cessat...certa ac totali cessatione causae motivae."—can. 86.

[147] C. 30, D.I., *de cons.*

[148] "Si vero aliquis eventus necessitatis fuerit...cum ecclesie fuerint combuste, que continuo non possunt reparari—, tunc in tabula consecrata poterit missa celebrari...in ipsis ecclesiis combustis."—Rufinus, *Summa Decretorum,* p. 545.

character of the event in the presence of which an exception may be made, signifies: *as a temporary measure*; not in itself: *for just one celebration of Mass,* but as long as the case of necessity, that is, the extraordinary occurrence and the just and reasonable cause both continue to co-exist. Pre-Code jurisprudence understood *per modum actus* in this manner. A distinction was made between celebrating Mass outside the properly appointed places always and without any necessity: "*. . . absque ulla necessitate . . . perpetuo celebrandi per modum habitus . . .*"; and celebrating Mass in like manner as a temporary measure if a just cause was present: "*. . . per modum actus pro aliquo tempore, si iusta adsit causa*".[149] This manner of celebrating Mass by way of exception was considered permissible as a transitory measure only; nor for an indefinite time, not to say perpetually.[150] Accordingly, the dispensation in this matter would cease when, in the judgment of the Ordinary, the conditions have so changed with the progress of time that the extraordinary state of affairs has ceased, so that the use of the dispensation has become unlawful, of which decision the Ordinary should inform the grantee.[151]

A survey of the previous pages seems to reveal the following relation between pre-Code law and the law of the Code concerning the subject matter of this discussion. The pre-Code jurisprudence with regard to the celebration of Mass *extra loca sacra* is reflected in Canon 822, § 4 of the Code.[152] The attitude of the Church may appear to have become somewhat milder in the course of time, for instance, in apparently extending more liberally in our day the exception which canon

[149] S. Alphonsus, *Theol. Moral.*, VI, n. 359; cf. etiam Many, *De Missa,* n. 5.

[150] Cf. Gury, *Comp. Theol. Moral.*, Pars. II, n. 386; Gury-Ballerini, *Compendium Theologiae Moralis,* II, (10 ed., Romae, 1889), n. 386, II; Konings, *Theol. Moral.*, n. 1328, II.

[151] Cf. cann. 86; 77; Reilly, *The General Norms of Dispensation,* (Catholic University of America, Canon Law Studies, n. 119, Washington, D. C., 1939), p. 129-130.

[152] Cf. *AAS,* XVIII (1926), 389, (*Adnotationes RR.PP. Consultorum*).

822, § 4 represents, regarding extraordinary events involving the spiritual benefit of single individuals.[153] For instance, there certainly seems to be a difference between the permissibility of Mass outside sacred places only in a case when Viaticum cannot otherwise be administered to a person in danger of death [154] or for the fulfillment of the paschal precept [155] on the one hand, and on the other the cases cited immediately above in the event of the demise of some prominent person. However, long before the time of the Code it was recognized by grave and prudent juristic thought that the Bishop could allow the celebration of Mass in the home of a person of distinction or nobility who could not come to church because of old age or illness, in order that he might attend Mass and receive Holy Communion.[156] It must be understood, however, that the person in question was one who was considered truly and worthily distinguished, a *"persona qualificata"* [157] or *"insignis vir"*;[158] namely, one who had merited well of the Church or civil society. It may also be recalled here that a law may require at various times and under various conditions a more strict application.[159] Thus the Council of Trent expressed itself severely against offering Mass outside the properly appointed places because of abuses in this matter and

[153] Cf. S. C. Sacram., *Romana et aliarum,* 3 maii 1926.—AAS, XVIII (1926), 388, cited above with examples of exceptions at the demise of distinguished persons.

[154] "...cum extra summum necessitatis casum apud infirmos, in aedibus non Sacris, Missam celebrare non liceat."—Benedictus XIV, decr., *"Inter omnigenas"*, 2 febr. 1744, § 22.—*Fontes,* n. 339; S. C. de Prop. Fide, instr. (ad Ep. Scodren.), 11 sept. 1779.—*Fontes,* n. 4581; S. C. de Prop. Fide, 14 dec. 1668.—*Fontes,* n. 4480.

[155] S. C. de Prop. Fide, (C. P.—pro Sin.—Sutchuen.), 6 sept. 1821.—*Fontes,* n. 4726.

[156] Cf. Petra, *Commentaria Ad Constitutiones Apostolicas,* II, (Venetiis, 1741), 264, nn. 10-11, and the authorities there cited on behalf of this opinion; S. Alphonsus, *Theol. Moral.,* VI, n. 359, *in medio.*

[157] Petra, *ibid.,* n. 11.

[158] S. Alphonsus, *loc. cit.*

[159] Cf. Van Hove, *De Privil. et Dispens.* n. 454.

irreverence to the Holy Sacrifice.[160] Hence, one is to conclude that the moral necessity for the exception has always admitted degrees of urgency. In all such cases as mentioned above one may rightly think of the just and reasonable cause as being present, inasmuch as the celebration of Mass, which Petra calls a *"res nimis gravis"*,[161] is duly and properly employed directly for the worship of God and the grave spiritual good of the faithful. The number and type of extraordinary occasions on which the just and reasonable cause is fulfilled are such as those mentioned and many others similar. Finally, in cases such as those outlined, where individuals are directly and primarily benefited, the dispensation is at least indirectly referable to the common good, as it must always be.[162] For certainly greater respect and observance of the law and good will are conjointly fostered in individuals and among the members of the community as such in acknowledgment of a well merited or very opportune and beneficial exception made by ecclesiastical authority on behalf of an individual member of the society.

Pre-Code law and jurisprudence conceived the conditions of canon 822, § 4 considered in the foregoing as a unit, as it were, and called them a "case of necessity" (*aliquis eventus necessitatis*).[163] The law of the Code in canon 822, § 4 seems simply to have analyzed the component parts of this "case of necessity" and to have expressed its content in two essential elements into which each such case must be reducible before the exception to the law of canon 822, § 1 can operate; namely: only a just and reasonable cause and an extraordinary occur-

[160] Conc. Trident., sess., XXII, *de observandis et evitandis in celebratione Missae;* Petra, *Commentaria Ad Constitutiones Apostolicas,* II, 264, n. 10.

[161] *Op. cit.,* n. 12.

[162] "Ad primum ergo dicendum, quod quando cum aliquo dispensatur ut legem communem non servet, non debet fieri in praeiudicium boni communis; sed ea intentione ut ad bonum commune proficiat."—S. Thomas, *Summa Theologica,* II, (Romae: Domus Editorialis Marietti, 1939), 1, 2ae, q. 97, art. 4, ad 1.

[163] Cf. Rufinus, *Summa Decretorum,* p. 545.

rence of some kind. Since the extraordinary occurrence is by nature a transitory event, it would seem quite logical to say that from the very nature of things the permission to celebrate Mass outside sacred places, since it is to be given only in the presence of an extraordinary event, must be only a temporary provision coextensive with the event or occurrence which is considered extraordinary. Hence, the provision of canon 822, § 4, to the effect that the exception to canon 822, § 1 may be allowed only *per modum actus,* grows out of the very external situation, the concrete state of things in any given extraordinary instance. It may therefore correctly be said that the grant under the provisions of canon 822, § 4 is limited by the cumulative presence of three items: a) a solely just and reasonable cause; b) an extraordinary event; c) a temporary measure (*per modum actus*).[164]

The case presented at the beginning of this discussion seems to have distinctly extraordinary features; not that it is extraordinary for Catholics to be in prison! The Catholics in prison are *great in number.* If the several communities of the district in question are appreciably populated by Catholics, it is not ordinary that the prison should have no Catholic chapel of some kind. Chapels may readily be erected in such places of detention, so that the inmates may have ample opportunity to attend divine services.[165] If, on the other hand, the communities which the prison serves do not have a considerable Catholic population, the situation seems still more extraordinary. In any case, it seems clear from what has been discussed in the previous pages that there is present a *casus extraordinarius,* which in this instance consists precisely in the fact of a considerable number of the faithful removed from the ordinary place of divine services and especially at such times when, as on Sundays, they should go to Mass.

Secondly, these Catholic inmates as a whole, at least, may well be thought to desire to have divine services, because those

164 Cf. S. C. Sacram., *Romana et aliarum,* 3 maii 1926.—*AAS,* XVIII (1926), 389, (*Adnotationes RR.PP. Consultorum*).

165 Cf. Can. 1192-1193.

who are ill receive the ministration of the priest. One may therefore suppose that the Catholics in the prison wish to fulfill their obligation of Mass on days of precept and to receive the Sacraments on those occasions and thus reestablish themselves spiritually. Hence there seems more than ample just and reasonable cause for having divine services in a properly arranged place in the prison.

If the presence of an appreciable number of Catholics at the prison is a usual thing, then efforts to have a chapel there are in order. In the meantime the extraordinary state of affairs continues and, according to the judgment of the Ordinary, Mass could *per modum actus* be offered there even on weekdays.

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Cases and Studies

THE *VICARIUS ADIUTOR* AND THE *MISSA PRO POPULO*

I have been appointed to this parish as *vicarius adiutor*. My pastor's state of health is so uncertain that it usually falls out that he must ask me to apply the *Missa pro populo*. It so happens that I have agreed to celebrate the solemn high Mass in my home parish on the feast of St. Andrew the Apostle, the titular feast of that parish. What arrangement am I to make regarding the application of the *Missa pro populo* on that day? Should I assume the responsibility of calling in a priest to celebrate the *Missa pro populo* in the parish church in view of my absence on that day?

Canon 466.—§ 1. Applicandae Missae pro populo obligatione tenetur parochus ad normam can. 339.

§ 3. Ordinarius loci iusta de causa permittere potest ut parochus Missam pro populo alia die applicet ab ea qua iure adstringitur.

§ 4. Parochus Missam pro populo applicandam celebret in ecclesia paroeciali, nisi rerum adiuncta Missam alibi celebrandam exigant aut suadeant.

§ 5. Legitime absens parochus potest Missam applicare vel ipse per se in loco quo degit, vel per sacerdotem qui eius vices gerat in ecclesia.

Canon 339.—§ 1. Debent quoque [episcopi], post captam sedis possessionem . . . . omnibus dominicis aliisque festis de praecepto, etiam suppressis, Missam pro populo sibi commisso applicare.

§ 4. Episcopus Missam pro populo diebus supra indicatis per se ipse applicare debet; si ab eius celebratione legitime impediatur, statis diebus applicet per alium; si neque id praestare possit, quamprimum vel per se vel per alium applicet alia die.

§ 6. Episcopus, qui obligatione de qua in superioribus paragraphis, non satisfecerit, quam citius pro populo tot applicet Missas, quot omisit.

Canon 475.—§ 2. Adiutori, si in omnibus suppleat parochi vicem, iura omnia et officia competunt parochorum propria, excepta Missae

applicatione pro populo quae parochum gravat; si vero suppleat ex parte dumtaxat, eius iura et obligationes desumantur ex litteris deputationis.

§3. Si parochus sit sui compos, adiutor operam suam praestare debet sub eiusdem auctoritate secundum Ordinarii litteras.

The canons here quoted make it manifest that the application of the *Missa pro populo* exists primarily as a personal obligation, and only secondarily as a local one. Even if the parochial adjutant (*vicarius adiutor*) were in all things called on to assume his pastor's sphere of rights and duties, there is one exception which still stands—the application of the *Missa pro populo* remains as a burden of duty for the pastor. While it must be granted that a pastor's total disability may occasion also the need that the adjutant in the name of the pastor arrange for the application of the *Missa pro populo,* yet the making of such arrangements, even if it constitutes part of the adjutant's official work, is a matter quite distinct from that of the personal responsibility for the application itself.

In the former case nothing more is demanded than that the adjutant find someone who will apply the *Missa pro populo* in the parish church as long as various circumstantial factors do not make it necessary or leave it advisable that the Mass be celebrated elsewhere; in the latter case it would be demanded that the adjutant personally assume the obligation of the application of the Mass, and discharge it in the parish church as long as there were no commendable reason to justify the saying of the Mass elsewhere.

The very fact that it usually falls out that the pastor must ask the adjutant to apply the *Missa pro populo* is evidence that the pastor is not under any disability which makes it impossible for him to arrange for the fulfillment of his own personal obligation regarding the *Missa pro populo.* Correspondingly there does not exist any obligation on the part of the adjutant even to arrange for the saying of the Mass, unless his pastor has requested that this be done for him by the adjutant.

Since it is to be assumed that in the present case the pastor will not himself be able to celebrate the Mass, he is free either to call on a priest from the outside to say the Mass on the feast of St. Andrew at the parish church, or to have his adjutant apply it on that feast day in St. Andrew's parish. If the first of these methods should under the circumstances prove impracticable, surely the second is fully acceptable in the law, for if an absent pastor who

personally celebrates the *Missa pro populo* can fulfill the law though the Mass is celebrated elsewhere than in the parish church, then also an ailing pastor who must call on someone else for the celebration of the *Missa pro populo* can fulfill the law though the Mass is celebrated outside of the parish church of the pastor.

The various factors regarding the consideration of time, person and place in the obligatory act of applying the *Missa pro populo* are of necessity inter-related within a definite framework of priority or precedence. Just as it is of stricter obligation that the Mass be applied on the specified day than that it be applied by the pastor or in the parish church, so also it appears more strictly mandatory that the Mass be said by the pastor than that it be said in the parish church. A granted permission constitutes the sole condition in consequence of which the *Missa pro populo* may be said, either by way of anticipation or by way of postponement, on a day other than the one to which the law attaches the obligation. On the other hand, cases in which the pastor may lawfully celebrate the Mass outside the parish church are readily thinkable, for the law concedes that various sets of circumstances may demand such a procedure, or at least vindicate its advisability. Moreover, an absent pastor is given a free choice personally to apply the Mass while he is away from his parish church. Thus it becomes evident that in the fulfillment of the application of the *Missa pro populo* the factor of time enjoys a prior claim over the factors of person and place, and that in relation to the personal element in the obligation the consideration of the local factor is of a merely subsidiary import.

If the personal element of the obligation, namely in the sense of the pastor's personal celebration of the Mass, can no longer claim any consideration in view of the pastor's ailing condition, then one must look to the relative importance of the remaining factors. Of these the temporal factor takes precedence over the local factor. Hence the law appears more desirous of having the Mass applied on the designated day, even though it be celebrated outside of the parish church, than of having the Mass celebrated in the parish church, but on a day other than the designated one. For the latter mode of procedure the law seems to demand at least a presumed permission on the part of the local ordinary, even when there is question of but a single postponement.

Father Thomas A. Donnellan, in a recent dissertation which deals specifically with the obligation of the *Missa pro populo*, states:

> It is correct to say that the permission of the Ordinary may be presumed in a single case. The cause usually arises suddenly with little opportunity to approach the bishop. Indeed it can even be held that a dispensation is tacitly granted; for it is not unusual for pastors to act on a presumed permission to transfer the application of the Mass for the people in a particular case. The fact that the bishop does not prohibit this when he could easily do so affords grounds for supposing that a tacit dispensation has been granted for the particular case.[1]

The parochial adjutant in the present case is certainly not burdened with any personal concern or duty regarding the application of the *Missa pro populo*. If the pastor calls on the adjutant to apply the Mass, even while the latter is away from his pastor's parish church, then the adjutant will accede to his pastor's wish similarly as he does it when he celebrates the Mass at the parish where he is appointed.

The pastor will do well to have the Mass applied on the designated day, even though the Mass can be said only in some church other than the parish church. If occasional need for a deviation from the designated day should arise, the pastor may well explain the situation to his ordinary. The latter may see fit to indicate for what specific causes and in what particular instances the pastor should feel permitted to anticipate or to postpone the application which can not be undertaken on the designated day itself except with a considerable degree of inconvenience, an added expenditure of hard effort, or a compromise with the ordinary demands of other parochial interests.

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[1] *The Obligation of the Missa pro Populo*, The Catholic University of America Canon Law Studies, no. 155 (Washington, D. C.: The Catholic University of America Press, 1942), p. 106. With reference to canon 466, § 3, this author treats in succession the following questions: The just cause, the exercise of the dispensing power, and the causes excusing from the local obligation. This treatment is found on pp. 102-110 of his work.

MASSES APPLIED *EX TITULO IUSTITIAE*

I. A pastor who is ill obtains the services of another priest, who takes his place over the week-end. The substituting priest has a Mass intention which he wishes to satisfy (*ex stipendio*), and at the same time is requested by the pastor to offer the *Missa pro populo*, since the latter is unable to do so. The conditions requisite for lawful bination are present. May the substituting priest offer both of these Masses on the same day, provided that he does not receive or accept from the pastor a stipend for the *Missa pro populo?* Or is he forbidden by the ruling of canon 824, § 2, to offer on the same day a stipend Mass and also the *Missa pro populo*, which the pastor requests to be said in fulfillment of his duty, even when no stipend is accepted for the latter of these two Masses?

II. After the death of a priest it is learned that there remain on his Mass Record Book many listed Mass intentions *ex stipendio* which have not yet been acquitted, and for which no funds or offerings are available from the deceased priest's estate. Out of charity a number of the neighboring priests agree to accept a proportionate number of these Mass intentions in order to acquit them, apart from any stipend, through their own personal celebration of the Masses. May these priests, when they binate on Sunday, offer a stipend Mass and likewise offer a Mass for one of the intentions which were not yet acquitted by the deceased priest?

Canon 824, § 2. Quoties autem pluries in die celebrat, si unam Missam ex titulo iustitiae applicet, sacerdos, praeterquam in die Nativitatis Domini, pro alia eleemosynam recipere nequit, excepta aliqua retributione ex titulo extrinseco.

Canon 827. A stipe Missarum quaelibet etiam species negotiationis vel mercaturae omnino arceatur.

Canon 828. Tot celebrandae et applicandae sunt Missae, quot stipendia etiam exigua data et accepta fuerint.

Canon 829. Licet sine culpa illius qui onere celebrandi gravatur, Missarum eleemosynae iam perceptae perierint, obligatio non cessat.

Canon 840, § 1. Qui Missarum stipes manuales ad alios transmittit, debet acceptas integre transmittere, nisi aut oblator expresse permittat aliquid retinere, aut certo constet excessum supra taxam dioecesanam datum fuisse intuitu personae.

The answer to the proposed questions must be sought through one or the other of two possible approaches: an approach which follows the lead of equity, or an approach which is directed by the dictate of strict justice. It is through a correct concept of which of these two factors predominates that one must seek the final answer.

Those who follow the lead of equity can argue that the application of the *Missa pro populo* according to the supposition associated with the first case, as also the application of a second Mass

according to the assumption postulated in the second case, namely, in satisfaction for an intention which in fact no longer has any stipend connected with it, does not involve on the part of the celebrant of these Masses any violation of the law enacted in canon 827. They can also contend that in reality the law of canon 828 has been fulfilled, inasmuch as the particular Mass, whether it was called for in consequence of the pastor's obligation to offer the *Missa pro populo,* or as a result of the originally offered stipend, actually has been celebrated and applied for the specific intention for which the obligation in justice existed.

They may furthermore insist that it lies within the power of the celebrant of these Masses to surrender whatever right he may have had to the receiving of a stipend, and that in view of disclaiming the use of this right he can satisfy the obligation thus taken over by him. They may likewise feel that, once the Masses have been offered and applied gratis for the intention which the obligation in justice called for, the Masses need not again be offered in the nature of stipend Masses as a sole and exclusive way to effect the proper acquittal of the obligation originally assumed on the title of strict justice. With this same consideration expressed in a somewhat different fashion, they may be willing to admit that an obligation which rested upon someone as an obligation of commutative justice can later be taken over by a second person to be acquitted by him *ex caritate.*

It is precisely on this point that it appears imperative to take exception. An obligation which is assumed *ex iustitia* looks to its fulfillment through the placing of an act which itself is undertaken *ex iustitia,* and not merely *ex caritate.* Hence, if the saying of a *Missa pro populo* is in the name of the pastor undertaken by a substituting priest, then the latter must be able to undertake this obligation in the nature in which it exists, namely, as a Mass which he applies *ex titulo iustitiae.* Canon 824, § 2, implicitly demands that a Mass which is due in justice be offered as a Mass applied *ex titulo iustitiae.*

It is of course true that the substitute can *ex caritate* offer a Mass for the same intention that the *Missa pro populo* itself calls for, and thus the members of the parish are given the benefit of a Mass offered in their behalf. But that is not enough. The supererogatory act of the substituting priest in offering a Mass *ex caritate* for the same intention for which the pastor must offer it *ex iustitia*

is not an effective way for absolving an obligation when its fulfillment is due *ex iustitia*. For example, I can not feel free of all further obligation to pay my creditor the amount of money I owe him in view simply of the fact that some personal friend has already paid my creditor an equivalent sum.

Moreover, if the substituting priest has not accepted a stipend from the pastor for the *Missa pro populo*, that act is to be explained in one of two ways: Either he permitted the pastor to retain the stipend corresponding to the Mass, or he received it, at least fictitiously, only to restore it to the pastor. In the first supposition the pastor still possesses the amount of money equivalent to a stipend which has not been given to the celebrant for the saying of a Mass which for the latter can only be a stipend Mass. In the second assumption the substituting priest has equivalently received a second stipend on the same day. Correspondingly, in the first supposition the pastor violates the law of canon 840, § 1; in the second assumption the substituting priest violates the law of canon 824, § 2.

If the *Missa pro populo* as also the stipend Mass be regarded as an obligation which arises *ex iustitia commutativa*, in view of the implied contract which underlies the obligation in either case, then it seems impossible to admit that the obligation of such a Mass can be satisfied when it is undertaken solely *ex titulo caritatis*. One could point to a parity situation in the law of the Church which for the fulfillment of the Sunday obligation of attendance at Mass makes it necessary that Mass be attended in accordance with specifically indicated conditions. A man who hears Mass in a domestic oratory does indeed hear Mass, but he still has not fulfilled his Sunday obligation within the framework of the law enacted in canon 1249. Similarly the substituting priest has offered a Mass which has yielded for the people the same benefit that the official *Missa pro populo* could yield, but the fact remains that under the circumstances it was not offered as a Mass which could have been applied by him *ex titulo iustitiae*. And similarly the priest who has taken over the saying of a Mass which originally was a stipend Mass has indeed offered this Mass for the intention indicated by the original stipend, but the fact likewise remains that in the given instance it was not offered as a Mass which could have been applied by him *ex titulo iustitiae*.

In the light of these considerations, and face to face with the clearly formulated wording of canon 824, § 2, it does not appear

tenable to the present writer that in either of the two situations here contemplated the existing obligation can be acquitted by means of an act which can at most be motivated *ex caritate,* inasmuch as no option is given in the law to assume the performance of the act *ex titulo iustitiae.*

The writer is not unaware of the more liberal attitude in which Canon E. J. Mahoney answered to two proposed doubts of a similar character. These doubts were the following:

> The contributions of the faithful placed, at the parish priest's invitation, in the Holy Souls Box have been stolen. Is the parish priest bound in principle to get the Masses said? If so, how many? Could the obligation be discharged when saying the second Mass on days when duplication is permitted? (*The Clergy Review,* XXII [1942], 327.)
>
> If the Mass offering has been stolen from the priest who accepted it, may the obligation be discharged when saying a second Mass on Sunday? (*The Clergy Review,* XXIV [1944], 514.)

The answer as there given implied that the intentions could be acquitted by way of Masses which the priest said when binating:

> For the reason behind all these regulations about stipends is to prohibit negotiations and practices by which a priest, in applying or disposing of Mass offerings, might grow richer: in the case we are discussing he is not enriched at all, and the solution we favour, though by no means certain, seems to be probable and reasonable, namely, that the obligation may be discharged when duplicating.

The full answer, however, must regard not only the purpose of the law, but also the essence of the contract which creates the obligation. The implied contract is of a bilateral character which for its essence is rooted in the demands of a strict commutative justice. If that which is due by way of commutative justice can not be fulfilled by an act which is motivated solely *ex caritate,* then the assumed obligation of offering a *Missa pro populo,* or of offering a Mass which was originally accepted for application as a stipend Mass, can not be properly discharged by way of a bination Mass.

This holds true, then, whether or not a stipend was actually accepted in connection with its application. If a stipend were accepted, then there would be an open violation of the law of canon 824, § 2. If a stipend were not accepted, then, with reference to the applied *Missa pro populo,* there would be on the part of the pastor an implicit violation of the law of canon 840, § 1, and with

reference to the stipend Masses as taken over according to the supposition in the second case there would be a violation of the very contract which calls for the application of these Masses in the nature of stipend Masses.

Apart from an apostolic indult or some act of commutation or condonation granted by the Holy See, or by some other authority with proper faculties, it appears to the writer as an inescapable conclusion that any and every Mass intention which must be discharged in fulfillment of a duty which binds in justice must correspondingly be applied, no matter by whom, as a Mass which excludes the possible acceptance of a stipend for a second Mass on a day when a priest binates.

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PASTOR OF THE BRIDE-ELECT

A published statement of mine, that womanly modesty was the reason back of the rule or norm enacted in Canon 1097, § 2, which directs us to give preference to the bride's parish for the celebration of marriage, has been questioned both by Monsignor Tobin [1] and by Father Piontek.[2] Hence I append a list of authorities upon whom I relied for the statement that womanly modesty rather than a canonical reason motivated the said rule.

(1) De Smet:[3]

A footnote refers to these words of Canon 1097, § 2: "in quolibet casu pro regula habeatur ut matrimonium coram sponsae parocho celebretur." The footnote reads: "Ratio hujus inductae regulae exhibetur a S. Ambrosio (De Abraham 1, IX, 91): 'Virginalis enim pudoris est, ut quae nubit expetita magis videtur a viro quam ipsa virum expetisse'."

(2) Payen:[4]

"Probat *ratio legis,* quae in usu multorum locorum et in verecundia, virginis propria, nititur. Ut enim dicit S. Ambrosius, 'virginalis . . . . pudoris est . . .' (De Abraham, 1, c. 9, n. 91; P. L. 14, p. 454)."

[1] THE JURIST, IV (1944), 130.

[2] THE JURIST, III (1943), 459.

[3] *De Sponsalibus et Matrimonio,* (4. ed., Brugis: Car. Beyaert, 1927), I, n. 125, footnote 4.

[4] *De Matrimonio,* (3 vols., Zi-ka-wei, 1929), II, n. 1805, d.

(3) Vlaming:[5]

"Ratio autem qua hic usus commendatur, his inest, quae scribit S. Ambrosius: 'Virginalis enim pudoris est . . . .'" His footnote refers to Migne, XIV, 454.

(4) Chrétien: [6]

"'In quolibet casu, etc.' Ratio hujus usus et regulae videtur esse convenientia; nam non feminae est quaerere maritum sed viri est quaerere uxorem."

(5) Carberry:[7]

"This practice is but the dictate of natural courtesy that the bridegroom should go to receive the bride in her parish and not require her to seek him." (His reference is: St. Ambrose, *De Abraham*, I, c. 9, n. 91—*M.P.L.* XIV, p. 454.)

(6) Dens:[8]

"Usus vero passim obtinet ut matrimonium celebretur coram parocho sponsae quia decet juxta S. Ambrosium: 'Virginalis enim pudoris est ut quae nubit expetita magis videtur a viro quam ipsa virum expetisse.' De Abraham, l. I, c. IX, n. 91."

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RELIGIOUS AND DIOCESAN PENAL STATUTE

In diocese X a statute provides that: "No assistant shall own or operate an automobile, except on parish business, under penalty of thirty-days suspension." Titius, assistant at parish Y, entrusted to a religious order, operates an automobile on other than parish business. Is he liable to the penalty provided in the statute?

Vicarius Cooperator Regularis.

Since this is a question of penal law, a strict interpretation must be followed.[1] Such strictness of interpretation involves here a con-

[5] *Praelectiones Iuris Matrimonii*, (3. ed., 2 vols., Bussum in Hollandia, 1919-1921), II, n. 581.

[6] *De Matrimonio*, (2. ed.), n. 219.

[7] *The Juridical Form of Marriage*, The Catholic University of America Canon Law Studies, n. 84, (Washington, D. C.: The Catholic University of America, 1934), p. 107.

[8] (Pre-Code), *De Matrimonio*, n. 88.

[1] Canon 19: Leges quae poenam statuunt, aut liberum exercitium coarctant, aut exceptionem a lege continent, strictae subsunt interpretationi. Canon 2219, § 1: In poenis benignior est interpretatio facienda.

sideration of the question, who has jurisdiction over Titius, since it is admitted that he is an assistant at parish Y, not merely a missionary in residence there helping out when he is at home, and that he did operate the automobile, not merely ride in it, and this "on other than parish business." The jurisdictional question is whether he is subject to this episcopal legislation.

If Titius is a member of a Regular Order he must be shown to be subject to the episcopal legislation, since he is, in such case, *prima facie* exempt from the jurisdiction of the Ordinary of the place, with such exceptions as are expressly provided by law,[2] his subjection to the Apostolic See being through a channel other than that of diocesan organization. If he is not a member of an exempt religious order he must be shown to be exempt from episcopal legislation if he wishes to avoid the penalty, since he is *prima facie* subject to the jurisdiction of the Ordinary of the place in such case, except in so far as exemption has been specially granted.[3] It is further to be noted that in all matters in which religious are subject to the Ordinary of the place they can be constrained by the latter, even by means of penalties.[4]

Since the operation of the automobile was something which occurred outside the religious house, we need not consider the question of interference by the Ordinary of the place within the religious house as such.[5] If Titius, then, is not ordinarily exempt from the

[2] Canon 615: Regulares, novitiis non exclusis, sive viri sive mulieres, cum eorum domibus et ecclesiis, exceptis iis monialibus quae Superioribus regularibus non subsunt, ab Ordinarii loci iurisdictione exempti sunt, praeterquam in casibus a iure expressis.

[3] Canon 618, § 1: Religiones votorum simplicium exemptionis privilegio non gaudent, nisi specialiter eisdem fuerit concessum.

[4] Canon 619: In omnibus in quibus religiosi subsunt Ordinario loci, possunt ab eodem etiam poenis coerceri.

[5] Cf. Canon 615. Canon 617, § 1: Si in regularium aliorumve religiosorum exemptorum domibus eorumve ecclesiis abusus irrepserint, et Superior monitus prospicere neglexerit, Ordinarius loci obligatione tenetur rem ad Sedem Apostolicam statim deferendi. § 2: Domus autem non formata manet sub peculiari vigilantia Ordinarii loci, qui, si abusus irrepserint et fidelibus scandalo fuerint, ipse per se potest interim providere. Canon 618, § 2, 2°: In religionibus tamen iuris pontificii Ordinario loci non licet: Sese ingerere in regimen internum ac disciplinam, exceptis casibus in iure expressis; nihilominus in religionibus laicalibus ipse potest ac debet inquirere num disciplina ad constitutionum normam vigeat, num quid sana doctrina morumve probitas detrimenti

jurisdiction of the Ordinary of the place it seems that in this case he is subject to the statute and to the penalty.

If, however, Titius is ordinarily exempt from the jurisdiction of the Ordinary of the place we must seek grounds to bring him under the statute if we desire to inflict the penalty provided therein. If grounds are sought in Titius' position as assistant it will be necessary to consider the canons which apply to religious as pastors for an analogy. These canons, however, are concerned, in so far as they relate to jurisdiction of the Ordinary of the place, with goods received for the parish,[6] and offerings for the building, upkeep, restoration, and decoration of the parish church, if it does not belong to the religious community,[7] and with the exercise of the ministry,[8] in which latter connection the Ordinary of the place can give decrees and establish penalties if the religious as pastor fails in his duties.[9] In the present case, however, we are faced with an action

ceperit, num contra clausuram peccatum sit, num Sacramenta aequa stataque frequentia suscipiantur; et, si Superiores de gravibus forte abusibus admoniti opportune non providerint, ipse per se consulat; si qua tamen maioris momenti occurrant, quae moram non patiantur, decernat statim; decretum vero ad Sanctam Sedem deferat.

[6] Canon 630, § 3: Bona quae ipsi [parocho religioso] obveniunt intuitu paroeciae cui praeficitur, ipsi paroeciae acquirit; cetera acquirit ad instar aliorum religiosorum.

[7] Canon 630, § 4: Non obstante voto paupertatis, eidem [parocho religioso] eleemosynas in bonum paroecianorum, vel pro scholis catholicis aut locis piis paroeciae coniunctis, quovis modo oblatas accipere aut colligere, et acceptas sive collectas administrare, itemque, servata offerentium voluntate, pro prudenti suo arbitrio, erogare, salva semper vigilantia sui Superioris; sed eleemosynas pro ecclesia paroeciali aedificanda, conservanda, instauranda, exornanda accipere, apud se retinere, colligere aut administrare pertinet ad Superiores, si ecclesia sit communitatis religiosae; secus ad loci Ordinarium.

[8] Canon 631, § 1: Idem parochus vel vicarius religiosus, licet ministerium exerceat in domo seu loco ubi maiores Superiores religiosi ordinariam sedem habent, subest immediate omnimodae iurisdictioni, visitationi et correctioni Ordinarii loci, non secus ac parochi saeculares, regulari observantia unice excepta.

[9] Canon 631, § 2: Ordinarius loci, ubi eum [parochum vel vicarium religiosum] suo muneri defecisse compererit, opportuna decreta condere ac meritas in eum poenas statuere potest; in quo nihilominus Ordinarii facultates minime privativae sunt, sed Superior ius cumulativum cum ipso habet, ita tamen ut, si aliter a Superiore, aliter ab Ordinario decerni contingat, decretum Ordinarii praevalere debeat.

done "on other than parish business," wherefore the foregoing canons seem not to apply.

The privilege of exemption might also be lost by Titius, if he is normally exempt, were he to live outside his house unlawfully,[10] but that is not shown in the present case.

If Titius, normally exempt, committed the "delict" while he was lawfully outside the house, which seems to be the case here, and has since returned to that house he can be punished by the Ordinary of the place only if the Superior after due notice has failed to punish him.[11] The question, thus seems to be reduced to whether an exempt religious is subject to the diocesan statute and penalty so that the Ordinary of the place can notify the religious Superior to punish him.[12]

Since the law in question is given for a particular territory, those are subject to it for whom the law is made and who have their domicile or quasi-domicile in the territory and are actually living there.[13] It is conceded that Titius is an assistant in one of the parishes of the diocese and is actually living in the diocese. There may be a dispute whether as a religious he can have a domicile or quasi-domicile, because of the clause "*si nihil inde avocet*"[14] and there may be question whether such domicile or quasi-domicile, if conceded, is in the territory of the diocese because of the question of exemption of the territory of the religious house from diocesan

[10] Canon 616, § 1: Regulares extra domum illegitime degentes, etiam sub praetextu accedendi ad Superiores, exemptionis privilegio non gaudent.

[11] Canon 616, § 2: Si extra domum delictum commiserint nec a proprio Superiore praemonito puniantur, a loci Ordinario puniri possunt, etsi e domo legitime exierint et domum reversi fuerint.

[12] Canon 2226, § 1: Poenae adnexae legi aut praecepto obnoxius est qui lege aut praecepto tenetur, nisi expresse eximatur.

[13] Canon 13, § 2: Legibus conditis pro peculiari territorio ii subiiciuntur pro quibus latae sunt quique ibidem domicilium vel quasi-domicilium habent et simul actu commorantur, firmo praescripto can. 14.

[14] Canon 92, § 1: Domicilium acquiritur commoratione in aliqua paroecia aut quasi-paroecia, aut saltem in dioecesi, vicariatu apostolico, praefectura apostolica; quae commoratio vel coniuncta sit cum animo ibi perpetuo manendi, si nihil inde avocet, vel sit protracta ad decennium completum. § 2: Quasi-domicilium acquiritur commoratione uti supra, quae vel coniuncta sit cum animo ibi manendi saltem per maiorem anni partem, si nihil inde avocet, vel sit reapse protracta ad maiorem anni partem.

laws. In the latter hypothesis Titius driving in the diocese might come under the statute as being one for " public order " and therefore binding on him as a *peregrinus*.[15] Most canonists since the Code, however, hold religious houses not so exempt that diocesan subjects violating a law therein are exempt from the penalty of a diocesan law.[16] That being the case, it would seem a religious who normally resides in such a house should not be considered bound as a *peregrinus* when he leaves the grounds of the religious house.

In conclusion, therefore, it seems that if Titius is normally exempt, he does not come under the jurisdiction of the Ordinary of the place in this case as assistant, since the act was done " on other than parish business," nor as one living unlawfully outside his house, which is not shown here, nor as a *peregrinus* violating a statute for " public order." While it may seem that he should be bound we cannot, in penal matters, transfer a penalty from person to person or from case to case, even if there is equal, or a more serious, reason for it,[17] except in cases of conspiracy or cooperation in the delict,[18] which is not the case here. As between governments, of course, violation of a law by a person normally immune to punishment is dealt with by demanding his recall as *persona non grata*. That solution might serve here.

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[15] Canon 14, § 1, 2°: Peregrini ... Neque legibus territorii in quo versantur [adstringuntur], iis exceptis quae ordini publico consulunt, vel actuum sollemnia determinant; ...

[16] Cf. Hammill, *The Obligations of the Traveler according to Canon 14*, The Catholic University of America Canon Law Studies, n. 160 (Washington, D.C.: The Catholic University of America Press, 1942), pp. 83 ff.

[17] Canon 2219, § 3: Non licet poenam de persona ad personam vel de casu ad casum producere, quamvis par adsit ratio, imo gravior, salvo tamen praescripto can. 2231.

[18] Canon 2231: Si plures ad delictum perpetrandum concurrerint, licet unus tantum in lege nominetur, ii quoque de quibus in can. 2009, §§ 1-3, tenentur, nisi lex aliud expresse caverit, eadem poena; ceteri vero non item, sed alia iusta poena pro prudenti Superioris arbitrio puniendi sunt, nisi lex peculiarem poenam in ipso constituat.

PENALTY FOR EXCESSIVE STIPENDS

I argue against my penal administrative removal from office on the ground that I took a stipend for many Masses in excess of the diocesan stipend. What I took was the stipend set by the provincial council for nuptial Masses. The occasions on which I took these stipends were golden and silver jubilees of married couples.

As this is an irremovable parish, I feel that even if I had committed a fault it would not justify removal.

PAROCHUS VEXATUS.

Even though the Code in the special administrative processes found at the end of the fourth book (Canons 2142-2194) permits local Ordinaries to proceed when the delicts specified there are verified, it nevertheless makes a sharp distinction between administrative and penal removal from office.

As regards penal removal it notes in Canon 2299, § 1, that, when it is a question of penal removal from an irremovable benefice, the Ordinary can proceed only in those cases specifically mentioned in the law. The only canon which permits removal of this nature for delicts such as the pastor of the irremovable parish in the case submitted might have committed is Canon 2324. Since, however, in the taxative enumeration of this canon there is no reference to either Canon 831 or Canon 1507 (for if any delict is to be found in the pastor's actions, it would be a violation of one of these canons as will be seen below), it is evident that there are no grounds for penal removal. Moreover even if this canon did permit such action in the present case, the removal would be invalid for want of a collegiate sentence as postulated by Canon 1576, 1° in this matter.

Likewise there seems to be no possibility of administrative removal in the case presented, for the pastor has committed no delict mentioned in the taxative list given in Canon 2182. Nor can the Ordinary proceed against the pastor by reason of Canon 2147; for while here one finds no such taxative enumeration (as is evident from "*praesertim*" of Canon 2147, § 2) yet, from the tenor of the canon, it is clear that for the validity of the administrative process there must be present a cause that renders the pastor's ministry harmful or at least inefficacious. An examination of numbers 1 to 5 of the same canon furnishes us with some idea of what such a cause should be, and makes it clear that such a cause is not verified

in the pastor's misdeeds in the present case. Then, too, it is to be noted that to use this administrative process, the Ordinary must observe all the formalities required by law for the validity of the process. From the pastor's complaint it is evident that this has not been done.

If one attempt to define the culpability of the present pastor's actions, one must conclude that he has sinned against Canon 831. Beste [1] states that Canon 1507 rules all stole fees with the exception of those defined in canons 831 and 1234. The pastor's culpability is to be measured from Canon 831. Although he claims that he has done nothing wrong inasmuch as he has been taking only that stipend determined in the provincial council for nuptial Masses, it seems nevertheless quite clear that the provincial legislation has to do only with such nuptial Masses at which marriage actually takes place, and that anniversary nuptial Masses should be considered as all other manual stipends subject to the offering as specified in accordance with Canon 831. Therefore if the pastor continues in this practice he will commit a sin against justice, but his sin will not give rise to an occasion of removing him either penally or administratively, nor will he be guilty of simony. There is no simony because according to the more common opinion to exact more than is permitted by the manual stipend is merely pressing beyond the limits of justice a title which he actually has to the stipend.[2]

Finally the Ordinary can not proceed against this priest by virtue of Canon 2222, § 1, since neither scandal nor special gravity is present in the pastor's actions *per se*. One says "*per se*" because such a practice continued for many years could give origin to either or both of these elements required for the valid application of Canon 2222, § 1; and special circumstances may even bring a single violation within that canon. A remedy available to the Ordinary to stop this evil practice seems to be found in giving the pastor a precept to cease under threat of a penalty, possibly a *latae sententiae* censure expressly reserved to himself.

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[1] Beste, *Introductio in Codicem* (Collegeville, Minn.: St. John's Abbey Press, 1938), p. 463.

[2] Cf. Vermeersch-Creusen, *Epitome Iuris Canonici*, (5. ed., 3 vols., Mechliniae-Romae: H. Dessain, 1934), II, n. 12, d.

ADMISSION OF NOVICES

The Superioress of the independent convent of the Sisters whose chaplain I am, has just recovered from a severe attack of pneumonia and is disturbed by the admission of candidates to the novitiate during her illness. The community is of diocesan approval of perpetual vows. Instead of consulting her, the Mistress of Novices spoke with the bishop who went over the matter with her, and with another member of the council who accompanied her to the Chancery, and agreed that the candidates might be admitted. However, in the rule approved by His Excellency it is the Superioress with the advice of the council that admits the novice. As a matter of fact, the Superioress had consulted each one of the council separately in an informal way prior to her illness, and they had agreed to admit all the candidates. But she is disturbed as to whether this suffices for valid admission.

CAPPELLANUS MEDIATOR

The invalidity of the admission to the novitiate of the Sisters mentioned in this case can arise from two causes: either the neglect of the consultation demanded in the constitutions, or the incompetency of the person who admitted them.

As regards the first, the invalidity cannot be proven, for although the majority of the commentators interpret the words of Canon 105, 1 °, to require such consultation on the part of the Superioress for the validity of the act, yet since the contrary opinion, which maintains that it is required for liceity only, has the support of so many authors of sound repute and good arguments as to make it probable, v.g. Vermeersch-Creusen,[1] Boudinhon,[2] Vromant,[3] Wernz-Vidal,[4] etc. Consequently in a matter which concerns the free exercise of power, we are forced by Canon 19 to follow the latter and milder opinion. Once this is admitted it seems redundant to inquire whether the consultation was sought by a capitular act as demanded in Canon 105, 2 °, for, if the lack of consultation cannot

[1] *Epitome Iuris Canonici*, I (3. ed., Mechliniae-Romae, 1927), n. 197 bis, pp. 151, 152; cf. Vermeersch, *Periodica*, XII (1923), (6)-(9), and Creusen, "L'effet juridique des consultations"—*Nouvelle Revue Théologique*, LV (1928), 100-116.

[2] "An nullus semper sit actus Superioris non petito consilio"—*Jus Pontificium*, VIII (1928), 29-35.

[3] *De Bonis Ecclesiae Temporalibus* (Lovanii, 1927), n. 40; *Ius Missionariorum*, II (Lovanii-Parisiis-Bruxellis, 1929), n. 356, p. 314.

[4] *Ius Canonicum*, II, *De Personis*, (2. ed., 1928), n. 33, p. 35, footnote 3. Cf. Bastnagel, *The Appointment of Parochial Adjutants and Assistants*, The Catholic University of America Canon Law Studies, n. 58 (Washington, D. C.: The Catholic University of America, 1930), pp. 206-228.

affect the *validity* of the act, then *a fortiori* the mode of consultation cannot.

The admission to the novitiate, however, seems invalid by reason of the non-observance of Canon 543 which grants the right of admitting to the novitiate so exclusively to the Superioress designated by the constitutions that Creusen,[5] citing Larraona, declares that to grant it to the Ordinary would be contrary to the common law. The fact that the Superioress before her illness consulted the other members of the council in an informal way and agreed with them on the admission of the candidates to the novitiate does not change matters, for there is a world of difference between finding no objections to the admission of the candidates to the novitiate and the actual juridical admission of them. Consequently all the Sisters mentioned in this case should, by a proper juridical act, be readmitted to the novitiate.

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CHANGE OF RELIGIOUS HABIT

The Sisters of a community of diocesan approval, with a local house in my parish, have commenced wearing shoes instead of the sandals which their constitutions provide. They claim that the winter temperatures imperil their health and that their community was founded in a warm climate where the wearing of sandals is not so grave an inconvenience. I desire to ask Your Excellency to dispense them from complying with the provisions of their constitutions in this matter.

AMICUS RELIGIOSARUM

Canon 495, § 2 forbids local Ordinaries in which a community of diocesan approval has houses to change in any way the rules of the community in those matters which according to Canon 492 had to be submitted *ab initio* to the Holy See. The Sacred Congregation of Religious [1] numbers among the things concerning which the Holy See must be consulted the color, form and material of the religious habit. Consequently the bishop has no power under the

[5] *Religious Men and Women in the Code* (3. English ed., Milwaukee: Bruce, 1940), p. 139; cf. also Larraona in *Commentarium pro Religiosis et Missionariis,* XVIII (1937), 321 sqq. Creusen (*loc. cit.*) questions the view held, as he admits, by grave authorities, which allows the constitutions to grant the council only a consultive vote. He thinks Canon 543 requires the deliberative vote of the council.

[1] *AAS,* XIII (1921), 312.

common law to grant such a dispensation, no matter how trivial the matter may seem. He may, however, grant permission to substitute the shoes for the sandals required by the constitutions as long as the Sisters are subject to the unaccustomed hardships of this northern climate, not by virtue of any power given him by the law but rather by a declaration that the law in question has ceased *ab intrinseco*. Ecclesiastical laws lose their binding force in face of a grave inconvenience extrinsic to the law itself such as is verified in the case at hand. A law to exist must be useful and good in relation both to the end and the persons for which it was passed. It seems, however, that the law forbidding the use of shoes not only does not have the aforementioned qualities but in view of the changed conditions of climate has become positively harmful and dangerous to the health of the parties concerned. Thus the changed circumstances of place and climate have so changed the nature of the law that, as long as conditions remain thus, the law itself is not just, and consequently of no binding force. The Ordinary might, however, still submit the question to the Holy See although he would not seem obliged to do so.

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JUNIOR CLERGY EXAMINATIONS

I have been ordained only four years but prior to my incardination in the diocese in which I now labor I completed my junior clergy examinations in the diocese from which I was excardinated and in which the junior clergy are required to take the annual examination for only three years. The Chancellor of the diocese of incardination tells me that I would be excused by the Most Reverend Bishop if this were within the law, but that the mere fact that I have taken the examinations for three years in a diocese in which my obligation was then fulfilled is not sufficient ground for such action. Is he correct in this position?

SACERDOS IUNIOR.

The local Ordinary cannot excuse the priest petitioner from the junior clergy examination for the reasons alleged in the plea.

Canon 130, § 1 leaves to the discretion of the local Ordinary the question of how long the priests subject to his jurisdiction shall be required to take this examination over and above the minimum of three years postulated by the Code. In other words the common law is in a certain sense indeterminate inasmuch as by the use of

the words "*saltem per integrum triennium*" it indicates that, while a three year period is indeed sufficient to satisfy its requirements, a longer period of time is preferable. The exact specification of the length of time is left to the Ordinary.

The priest in question lost at the time of his incardination into his new diocese his domicile in the diocese of excardination,[1] and consequently became according to Canon 94 subject to the exclusive jurisdiction of the Ordinary of the diocese of incardination. Thus under Canon 130, § 1, he is bound to the law concerning the junior clergy examinations as it exists in this diocese. The force of this conclusion cannot be escaped by asserting either that the priest cannot be bound to observe a law which he has already and fully fulfilled elsewhere (in the diocese of excardination) or by claiming that the extension of the time limit to five years by the Ordinary of the diocese of incardination is nothing more than a question of particular law. The answer is that this contention would be true only if the priest had remained in his former diocese, and had never become incardinated in the new diocese, but that from the moment of such incardination he became subject to not only the general law as binding in both dioceses, but also to the particular law of the diocese of incardination. For Canon 13, § 2, subjects him to the law as it exists in the diocese of incardination. In the absence of a just cause as required in Canon 84, § 1 the Ordinary cannot excuse him from the obligation.

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[1] Canons 95, 112 and 117, 3 °.

Decrees and Decisions

CANONICAL

SUPREMA SACRA CONGREGATIO S. OFFICII

Decretum [1]

Opera Prohibentur

Decreto 26 Martii 1924 huius Supremae Sacrae Congregationis S. Officii *opera et scripta omnia* Ernesti Buonaiuti damnata fuerunt; qui nihilominus perstitit in operibus edendis, etiam fundamenta fidei christianae evertere nitentibus, quorum aliqua iam a S. Officio proscripta sunt; nuperrime autem opus omnino improbandum edidit, cui titulus "Storia del Cristianesimo."

Itaque Emi ac Revmi Patres Cardinales Supremae Sacrae Congregationis Sancti Officii, rebus fidei ac morum tutandis praepositi, in plenario conventu feriae IV, diei 17 Maii 1944, praehabito RR. DD. Consultorum voto, damnaverunt atque in Indicem librorum prohibitorum inserenda mandarunt *opera et scripta omnia* ab Ernesto Buonaiuti post decretum supradictum usque ad eundem diem 17 Maii 1944 edita.

Et sequenti feria V, die 18 eiusdem mensis et anni, Ssmus D. N. Pius divina Providentia Papa XII, in solita audientia Excmo ac Revmo D. Adsessori S. Officii impertita, relatam Sibi Emorum Patrum resolutionem adprobavit, confirmavit et publici iuris fieri iussit.

Datum Romae, ex Aedibus S. Officii, die 17 Iunii 1944.

Ioannes Pepe, *Supr. S. Congr. Sancti Officii Notarius.*

Decretum [2]

Postremis hisce temporibus non semel ab hac Suprema S. Congregatione S. Officii quaesitum est, quid sentiendum de systemate *Millenarismi mitigati,* docentis scilicet Christum Dominum ante finale iudicium, sive praevia sive non praevia plurium iustorum

[1] *AAS,* XXXVI (1944), 176.

[2] *AAS,* XXXVI (1944), 212.

resurrectone, visibiliter in hanc terram regnandi causa esse venturum.

Re igitur examini subiecta in conventu plenario feriae IV, diei 19 Iulii 1944, Emi ac Revmi Domini Cardinales, rebus fidei et morum tutandis praepositi, praehabito RR. Consultorum voto, respondendum decreverunt, *systema Millenarismi mitigati tuto doceri non posse.*

Et sequenti feria V, die 20 eiusdem mensis et anni, Ssmus D. N. Pius divina Providentia Papa XII, in solita audientia Excmo ac Revmo D. Adsessori S. Officii impertita, hanc Emorum Patrum responsionem approbavit, confirmavit ac publici iuris fieri iussit.

Datum Romae, ex Aedibus S. Officii, die 21 Iulii 1944.

I. Pepe, *Supremae S. Congr. S. Officii Notarius.*

SACRA CONGREGATIO DE RELIGIOSIS

Decretum [1]

Quo efficacius atque fructuosius Sacra Congregatio Negotiis Religiosorum Sodalium praeposita munere sibi per can. 251 concredito perfungi valeat, Sanctissimus Dominus Noster Pius Divina Providentia Papa XII, in Audientia diei 24 Ianuarii 1944 infrascripto Secretario concessa, adprobare dignatus est, auctoritate apostolica, erectionem atque constitutionem in sinu eiusdem S. Congregationis, specialis Coetus seu Commissionis virorum idoneorum, quae omnes quaestiones ac negotia quavis ratione ad adspirantium et novitiorum iuniorumque sodalium, cuiuslibet religionis ac societatis, in commune viventium sine votis, religiosam et clericalem educationem atque in litteris scientiisque et ministeriis institutionem spectantia pertractet.

Constitutae Commissioni incumbent praesertim munera quae sequuntur:

a) definiendi et delineandi criteria cardinalia et peculiares notas, quibus educatio ac institutio religiosorum duci iugiter debet;

b) vigilandi circa ordinationes a Superioribus et Capitulis in rebus ad educationem et instructionem pertinentibus latas; necnon inspiciendi et recognoscendi relationes a Superioribus vel ab Apostolicis Visitatoribus quoad hoc exhibitas.

Commissio autem ad sessiones ordinarias vel extraordinarias, plenarias vel partiales, prouti negotiorum agendorum natura ac

[1] *AAS*, XXXVI (1944), 213, 214.

momentum ferre videantur, convocabitur. Sessiones habebuntur praeside ac moderante Sacrae Congregationis Secretario. Discussiones ac decisiones in acta opportune referentur.

Omnia illa quae a Commissione tractanda sunt quaeve singulorum Commisariorum vel Peritorum studio ac examini erunt subiicienda colligere, ordinare et convenienter praeparare Officialium erit Sacrae Congregationis, quorum etiam erit acta et documenta ad Commissionem pertinentia in Archivo asservare, decisiones sub ductu et auctoritate Praesidis executioni mandare aliaque ad rem spectantia ad praxim deducere et expedire.

Contrariis quibuslibet, etiam speciali mentione dignis, minime obstantibus.

Datum Romae, ex Aedibus Sacrae Congregationis, die, mense et anno ut supra.

Fr. L. H. Pasetto, *Secretarius.*

P. Arcadius Larraona, C.M.F., *Subsecretarius.*

SACRA CONGREGATIO RITUUM

Decretum [1]

urbis et orbis

Plures locorum Ordinarii Sanctissimo Domino Nostro Pio Papae XII exposuere sacerdotes suarum dioecesium, ob ingravescentes in dies belli causa difficultates, etiam vini penuriam pro sacrosancto Missae sacrificio passuros esse; ideoque Eum supplicibus verbis oraverunt, ut vini parsimoniae meliori quo fieri possit modo consulere dignaretur. Sanctitas porro Sua, in audientia infrascripto Cardinali Sacrae Rituum Congregationis Praefecto concessa, die 12 Maii 1944, attentis hodiernis peculiaribus rerum adiunctis, iisque perdurantibus, benigne indulget, ut purificationes et ablutiones calicis, quae in Missa, iuxta rubricas, cum vino primum ac postea simul cum aqua peragendae sunt, sola aqua fieri possint iis in locis ubi, iuxta prudens Ordinarii iudicium, vini angustiae hodie habeantur, vel in posterum praevideantur. Contrariis quibuslibet non obstantibus.

Die 12 Maii 1944.

✠ C. Card. Salotti, Ep. Praen., *Praefectus.*

L. * S.

A. Carinci, *Secretarius.*

[1] *AAS*, XXXVI (1944), 154.

Declaratio [2]

de benedictione apostolica

Quum Pontificale Romanum praescribat ritum et formulam Benedictionis Apostolicae, una cum plenaria indulgentia, populo impertiendae post Missarum sollemnia a Patriarchis, Primatibus, Archiepiscopis et Episcopis, dubium exortum est an ipsi Eminentissimi Patres Cardinales, quoties ipsis contigerit illam impertiri, uti debeant praefato ritu et formula sive in Urbe sive extra Urbem.

Et Sacra Rituum Congregatio proposito dubio respondendum censuit: "Extra Urbem: affirmative. In Urbe vero casus haberi nequit, cum ob Summi Pontificis praesentiam facultas impertiendi Benedictionem Apostolicam nemini tribuatur."

Facta autem Sanctissimo Domino Nostro Pio Papae XII horum relatione ab infrascripto Cardinali S.R.C. Praefecto, Sanctitas Sua declarationem huius Sacrae Congregationis approbavit.

Contrariis non obstantibus quibuscumque.

Die 23 Iunii 1944.

✠ C. Card. Salotti, Ep. Praen., *Praefectus.*

L. * S.

A. Carinci, *Secretarius.*

SACRA PAENITENTIARIA APOSTOLICA

Instructio [1]

circa sacramentalem absolutionem generali modo pluribus impertiendam

Ut dubia et difficultates removeantur in interpretanda et exsequenda facultate impertiendi in quibusdam rerum adiunctis absolutionem sacramentalem generali formula seu communi absolutione, sine praevia peccatorum confessione a singulis Christifidelibus peracta, Sacra Paenitentiaria opportunum ducit haec quae sequuntur declarare atque edicere:

I. Sacerdotes, licet ad confessiones sacramentales excipiendas adprobati non sint, facultate fruuntur absolvendi generali modo atque una simul:

a) Milites imminenti aut commisso proelio, prout in mortis periculo constitutos, quando, sive prae militum multitudine sive prae temporis angustia, singuli audiri nequeunt.

[2] *AAS*, XXXVI (1944), 221.

[1] *AAS*, XXXVI (1944), 155, 156.

Si tamen rerum adiuncta eiusmodi sint, ut vel moraliter impossibile, vel admodum difficile videatur milites absolvere imminenti aut commisso proelio, tunc licet eos absolvere statim ac necessarium iudicabitur (cfr. *Responsum* huius S. Paen. Ap., 10 Dec. 1940; *A.A.S.*, 1940, p. 571).

b) Cives et milites instante mortis periculo, durantibus hostilibus incursionibus.

II. Praeter casus in quibus agitur de mortis periculo, non licet sacramentaliter absolvere plures una simul, aut singulos dimidiate tantum confessos, ratione tantum magni concursus paenitentium, qualis verbi gratia potest contingere in die magnae alicuius festivitatis aut indulgentiae (cfr. Prop. 59 ex damnatis ab Innocentio XI die 2 Martii 1679): licet vero si accedat alia gravis omnino et urgens necessitas, gravitati praecepti divini integritatis confessionis proportionata, verbi gratia si paenitentes—secus nulla sua culpa—diu gratia sacramentali et sacra Communione carere cogantur.

Decernere autem si militum aut captivorum aut civium turma in tali necessitate inveniatur, locorum Ordinariis reservatur, ad quos praevie recurrere tenentur Sacerdotes, quoties id possibile sit, ut licite eiusmodi absolutionem impertiant.

III. Absolutiones sacramentales pluribus una simul a Sacerdotibus arbitrio suo impertitae, extra casus de quibus in n. I, vel non obtenta praevia Ordinarii licentia, licet hic adiri potuerit, iuxta dicta in n. II, utpote abusus habendae sunt.

IV. Antequam Sacerdotes sacramentalem absolutionem impertiant, quantum rerum adiuncta permittant, de his quae sequuntur Christifidelibus commonere debent:

a) Necessarium scilicet esse ut se quisque paeniteat admissorum suorum et a peccatis abstinere proponat.—Convenit etiam Sacerdotes opportune monere paenitentes, ut contritionis actum externo aliquo modo ostendant, si possibile sit, verbi gratia suum percutiendo pectus.

b) Atque omnino necesse ut, qui absolutionem turmatim acceperint, in primo deinceps suscipiendo Paenitentiae Sacramento, gravia singula peccata sua rite confiteantur, quae non antea confessi fuerint.

V. Sacerdotes aperte fideles doceant eos graviter prohiberi, ne, quamvis sibi conscii sint culpae mortalis, nondum in confessione recte accusatae et remissae, et obligatio integre lethalia peccata confitendi urgeat ex lege sive divina sive ecclesiastica, de industria

declinent huic obligationi satisfacere, occasionem exspectantes, qua absolutio turmatim detur.

VI. Meminerint vero locorum Ordinarii ut de hisce normis gravissimoque officio tunc Sacerdotes commonefaciant cum iisdem facultatis usum permittant—in peculiaribus rerum adiunctis—sacramentalem absolutionem generali formula una simul impertiendi.

VII. Si tempus suppetat, haec absolutio sueta atque integra formula in plurali numero impertienda est; secus vero haec brevior formula adhiberi potest: "Ego vos absolvo ab omnibus censuris et peccatis in nomine Patris et Filii et Spiritus Sancti".

Facta autem de praemissis relatione Ssmo D. N. Pio div. Prov. Pp. XII ab infrascripto Cardinali Paenitentiario Maiore, in Audientia diei 18 mensis currentis, idem Ssmus Dominus Instructionem Sacrae Paenitentiariae benigne adprobavit, confirmavit et publici iuris fieri mandavit.

Datum Romae, e Sacra Paenitentiaria Apostolica, di 25 Martii 1944.

N. Card. Canali, *Paenitentiarius Maior.*

L. * S

S. Luzio, *Regens.*

Decretum [2]

prex iaculatoria indulgentiis ditatur

Ssmus D. N. Pius div. Prov. Pp. XII, in Audientia infra scripto Cardinali Paenitentiario Maiori die 20 mensis maii vertentis anni concessa, votis libenter obsecundans plurium sacerdotum, benigne largiri dignatus est Indulgentias quae sequuntur: 1. *partialem quingentorum dierum* lucrandam a christifidelibus omnibus, qui, in adversis huius vitae rebus fidentem animum ad Deum erigentes, dominica verba "Fiat voluntas tua!" pia mente ac saltem corde contrito recitaverint; 2. *plenariam*, suetis conditionibus, ab ipsis acquirendam, si quotidie per integrum mensem eamdem recitationem devote persolverint. Praesenti in perpetuum valituro absque ulla Apostolicarum Litterarum in forma brevi expeditione. Contrariis quibuslibet minime obstantibus.

Datum Romae, ex aedibus S. Paenitentiaria Ap., die 10 Iulii 1944.

N. Card. Canali, *Paenitentiarius Maior.*

L. * S.

S. Luzio, Regens.

[2] *AAS*, XXXVI (1944), 222.

SECULAR

On March 17, 1944, the Court of Appeals of Kentucky reversed a decision of the Scott County Circuit Court on a bequest for Masses, and the opinion was written by Judge Sims, a non-Catholic, who said in part: " To one steeped in the Catholic faith nothing is more important than that masses be said for the benefit of the souls of the departed. It can not be doubted than $6,000 is a large sum to be left to priests for masses to be said. In *Coleman v. O'Leary's Ex'r,* 114 Ky. 388, 70 S. W. 1068, and in *Obrecht v. Pujos,* 206 Ky. 751, 268 S. W. 564, bequests for the saying of masses were upheld and in the former case $4,000 was bequeathed for that purpose. However, we are not concerned with the amount Mrs. Mahoney left the two priests for the saying of masses as it was her property and she had the right to dispose of it for any legitimate purpose she saw fit. She was the last of her family and for the salvation of herself, her husband and the Bradley family against eternity $6,000 was not such a large sum."

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In lieu of the 1940 law declared unconstitutional by the Kentucky Court of Appeals under which school districts were required to transport parochial school children in public school buses, the legislature enacted this year an act giving county fiscal courts discretionary power to use county road funds for bus service for any children attending school under the State compulsory education act, if they live more than " reasonable walking distance " from schools where sidewalks are lacking. The Attorney General Eldon S. Dummit has recommended that county fiscal courts obtain higher court approval before acting under this law.

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In mid-September the Supreme Court of New Jersey in a suit initiated by the Executive Vice President of the New Jersey Taxpayers' Association, in which he contended for the unconstitutionality of the law of 1941 requiring boards of education to furnish free transportation for children attending parochial and other private schools if the service was given to public schools, and in which the same position was taken by the American Civil Liberties Union acting as " friend of the court," by a vote of 2-1 upheld the contention of unconstitutionality of the act.

The popular vote in New Jersey affecting the new State Constitution was one of rejection. It had made no change in the provision of the present Constitution under which the Supreme Court held the affording of bus transportation to parochial school pupils to be unconstitutional.

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Senate Bill No. 637, which would provide $200,000,000 federal aid to needy schools in lieu of the previous bill which provided for an appropriation of $300,000,000 for a similar purpose, was debated on the floor of the Senate for several days but eventually recommitted to the Committee on Education and Labor, to whose Chairman, Senator Elbert D. Thomas, the Administrative Board of the National Catholic Welfare Conference has stated the Catholic position of opposition because the bill interferes with local control and does not make mandatory the inclusion of Catholic schools in its benefits.

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In Indianapolis Circuit Court Judge Earl R. Cox has upheld the constitutionality of a 1937 Indiana statute placing on the tax rolls all income-producing property owned by religious, fraternal, educational, and scientific institutions. The first tax payments are due in 1945. Under the State Constitution, exemption is permissible, and it was actually granted by a statute of 1921, which was of course repealed by the 1937 act.

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A California constitutional amendment passed in the November election authorizes the exemption from State taxation of property used exclusively for religious, hospital or charitable purposes, exclusive of parochial schools and institutions conducted on a profit basis. Church buildings were previously exempt.

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In accordance with the enabling act passed by the Legislature of California last year, ninety elementary schools of Los Angeles commenced a program of "released time" for weekday religious instruction with the beginning of the Fall school term.

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A proposed anti-labor amendment to the California State Constitution was defeated in the November elections. Foremost among its opponents was Most Rev. Charles F. Buddy, D.D., Bishop of San Diego.

The Executive Committee of the Federal Council of Churches (Protestant) has authorized its officers to protest the ruling that the inclusion by the War Man Power Commission of "church activities" in its list of essential activities does not apply to national and international church agencies and to seek a revision of it.

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The Federal Council of Churches of Christ (Protestant), meeting in late November in Pittsburgh, went on record as opposed to representation of the United States diplomatically at the Vatican and as being in favor of the traditional separation of Church and State which has characterized our governmental policy for some years past.

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The Federal Council of Churches of Christ in America (Protestant) has gone on record as being opposed to the passage of a compulsory training act until after the end of the war. So has the Synod of New York of the Presbyterian Church in the United States of America. *Labor,* a national weekly newspaper, has also editorially opposed it.

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The Association of Governing Boards of State Universities and Allied Institutions is on record as opposed to army and navy proposals for post-war compulsory military training.

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The National Conference of Methodist Youth condemned the Austin-Wadsworth bill for labor conscription and the Gurney-Wadsworth bill for a military draft after the war.

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The Post-War World Committee of the Catholic Association for International Peace is on record as opposed to peace-time conscription.

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The Appellate Department of the Los Angeles Superior Court holds that Jehovah's Witnesses have no constitutional right to proselytize hotel guests against managerial protest.

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The president of the Board of Education of Des Moines holds that religious instruction must be given in the public schools if democracy is to be preserved.

The Nashville Board of Education has approved an elective, "non-sectarian" program of character education for the current school year.

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Attendance in Toledo at weekday religion classes on released time is up almost fifty per cent over last year.

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The Attorney General of Louisiana has ruled that it is permissible for students of St. John's military high school and St. Vincent's college in Shreveport to ride at public expense the buses conducting pupils to public schools.

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The National Board of officers of The Catholic War Veterans by a resolution urges publishers of books and newspapers to adopt a code of ethics similar to that of the National Broadcasting Company, which requires reverent use of God's Name, the omission of ridicule of religion, accuracy and good taste in treatment of religious rites, and respect for ministers.

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The Fall catalogue of Montgomery Ward & Co. was held up by the postal authorities until the firm stamped "not available" four books on "marriage hygiene".

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The Board of District Commissioners of Washington, D. C., has approved the use of the services of ministerial students, during four hours a day for each student, in Gallinger Hospital, the municipal hospital.

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The Supreme Court of Brooklyn has denied incorporation to the American Jewish Evangelization Society and the American Jewish Missionary Society, alleged to be organizations for proselytizing among the Jews.

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A War-Time Emergency Commission for Conservative Judaism will deal with the problems incident to the entry of eighty-eight graduates of the Jewish Theological Seminary of America into the armed forces of the United States and Canada.

A monthly legislative bulletin, *Washington Report*, was begun on September 10 by the Congregational Council for Social Action.

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Dr. Herbert Wright, Professor of International Law at The Catholic University of America, writes in the *American Journal of International Law* that the Lateran Treaty gave notice to all nations of the world of the neutralization of Vatican City, the inviolability of which was thereby guaranteed under the customary rule of international law, confirmed by the Hague Convention of 1907 in the matter of the rights and duties of neutral powers and persons.

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The ordinance reestablishing republican institutions in France makes provision for retaining the laws enacted by the Vichy Government, as a climax of the movement begun under the Third Republic, to restore to members of religious congregations the rights of association and of teaching, and those looking to the betterment of domestic relations and the lessening of the evil of divorce.

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The Portuguese Supreme Court ruled against an inheritance tax on a bequest to a Catholic charity in virtue of the terms of the Concordat.

Book Reviews

BOOKS

A WORLD TO RECONSTRUCT. By Guido Gonella, translated by the Rev. T. Lincoln Bouscaren, S.J. The Bruce Publishing Company, Milwaukee, 1944. Pp. xxx-335. $3.50.

Dr. Guido Gonella, the author of this volume, was a professor of the philosophy of law. With this background he entered the field of journalism and contributed articles to the *Osservatore Romano*. Many of these articles were commentaries on the points for peace enunciated by Pope Pius XII. The Vatican Press published these articles in book form. The volume under review is an able and readable translation by Dr. Bouscaren.

The commentaries of Dr. Gonella are studies, explanations and discussions on the messages of the Pope delivered at Christmas, 1939, 1940 and 1941. The volume is divided into two parts: the reform of international morality and the reconstruction of the international order. The first part seeks to outline the various causes which bring war into the world; the second part points out the fundamental ideas which must be realized and acted upon if peace is to be permanent.

In discussing the reform of international morality some wholesome truths are once again placed before the public by the author of these commentaries. Taking the five points of the Pope's Christmas message of 1940, Dr. Gonella recounts the moral prerequisites of international reconstruction. One would like to set down all these points in detail, but space prohibits more than mere reference to one or two. Hate is denounced as the underlying element of discord which leads to war. Suspicion is likewise pointed out as a danger which must be met and conquered. The morality of States is the morality of men, as Dr. Gonella succinctly says. If this were only realized and not treated as a textbook maxim international morality could be reformed.

The second part of Dr. Gonella's commentaries ably explains the five points in the messages of the Pope delivered at Christmas, 1939 and 1941. These points consider ideas which must be acted

upon in the peace to come. All the points should be studied both in ethics and in international law. All the vexatious questions and problems arising over the years in international relations spring from a neglect of ethics. It will do the world no good to hide this fact. Hence, it is gratifying to know that the Pope has put his finger on the sore spot of the world. Every essay in this second part of Dr. Gonella's volume should be read carefully. Jurists, especially, should read and ponder over the essay, *Pacta sunt servanda.*

If anyone hesitates to read Dr. Gonella's work because it deals with ideas rather than with incidents, let him be assured that he will find this book fascinating and of absorbing interest. This, of course, is due in no small way to the clear and able translation of Dr. Bouscaren. Gratitude must be expressed to the Bishop's Committee on the Pope's Peace Points for making this volume accessible. We hope this volume will be widely circulated.

As a last word, the preface of His Excellency, the Apostolic Delegate, should not be neglected. It contains a brief but excellent study in Public Ecclesiastical Law.

EDWARD ROELKER

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WASHINGTON, D. C.

LAW LIBRARY IN THE LIBRARY OF CONGRESS PUBLISHES FIRST OF NEW SERIES OF LATIN AMERICAN LEGAL GUIDES

A new publication, which, as its title indicates, is designed to serve as a *Guide to the Law and Legal Literature of Cuba, the Dominican Republic and Haiti,* has just been issued by the Library of Congress. The book is the first to be published of a new series of guides to the law and legal literature of the Latin American republics presently being prepared by the Law Library in the Library of Congress. The current series is a continuation of the broader series concerned with the legal literature of the major countries of the world which the Library began to publish over a quarter of a century ago.

The *Guide to the Law and Legal Literature of Cuba, the Dominican Republic and Haiti* thus continues the contributions made by the Law Library to the field of legal bibliography, which has been actively cultivated by the Library of Congress since its publication in 1912 of a similar *Guide* for Germany. The active interest of the Law Library in Latin America dates back to the second decade of this century when Dr. Edwin M. Borchard, now of Yale University, was its Librarian. Dr. Borchard is the author of the well-known *Guide to the Law and Legal Literature of Argentina, Brazil and Chile,* published by the Library of Congress in 1917, which has served as a model for subsequent publications in the series.

The late Law Librarian, Dr. John T. Vance, was deeply interested in, and devoted much of his time to, the furtherance of Inter-American relations. He followed in Dr. Borchard's tradition by laying the ground-work for a *Guide to the Law and Legal Literature of Mexico*, which since his death has been completed and greatly extended by Mrs. Helen L. Clagett, chief of the Latin American Law Section of the Law Library, and which will shortly appear as number five in the present Latin American series sponsored by the Library of Congress. It was through Dr. Vance's efforts that work was made possible on all the present guides by the establishment in the Law Library of a Center of Inter-American Studies, with funds allocated by the Department of State as a project in its program for cooperation with the Latin American republics.

The present *Guide to the Law and Legal Literature of Cuba, the Dominican Republic and Haiti*, which is publication number three in the Latin American series sponsored by the Library of Congress, is a manual intended to acquaint the research worker not only with the legislation and the work of law writers in these countries, but also to give him some brief account of the principal aspects of their law. The critical bibliographical notes will serve as a guide for those who read Spanish and French and wish to work in the original sources. The descriptive matter is adapted to provide for the worker who has no knowledge of these languages a cursory acquaintance with their legal systems. Libraries will also find the *Guide* valuable as a checklist for their collection in Latin American Law.

The present *Guide* was compiled by Dr. Crawford M. Bishop, editor, and his assistant, Miss Anyda Marchant. Most of the material used in its preparation was obtained in the Law Library, rounded out with information and material acquired by Dr. Bishop on a personal visit to the countries represented, as well as through the valuable cooperation of several distinguished lawyers. These latter included Dr. Emilio Menéndez Menéndez, of Cuba; Dr. Gordon Ireland; the late Guy H. Lippitt, member of the bar of New York and an outstanding authority on the law of the Dominican Republic and Haiti; Dr. J. A. Bonilla Atiles and Lic. Julio Ortega Frier of the Dominican Republic; M. Abel Léger, one of Haiti's most distinguished jurists; and Dr. Clovis Kernisan, legal adviser of the Department of Foreign Affairs of Haiti. Mr. James B. Childs, of the Library of Congress, materially contributed to the work with his extensive knowledge of the governmental publications of the countries represented. Work on the *Guide* began under the supervision of Dr. Vance and was completed under the general direction of Dr. Eldon R. James, the present Law Librarian, who has contributed the preface.

It is arranged that, on completion of all the guides undertaken by the Law Library, the set of legal bibliographies available for the Latin American countries will omit none. Besides the guide for Mexico and that now ready for circulation, the present schedule calls for a *Guide to the Law and Legal Literature of Colombia*, by Mr. Richard Backus, member of the bars of New York and California, and Mr. Phanor Eder, member of the bar of New York, which will shortly be released from the Government Printing Office; a guide for Bolivia, Ecuador, and Paraguay, which is at present in press; and a guide for Peru, Uruguay and Venezuela. A supplement to Dr. Borchard's old guide for Argentina, Brazil and Chile, is also in preparation. The Library of Con-

gress series is supplemented by the *Guide to the Law and Legal Literature of the Central American Republics*, prepared by Mr. Edward Schuster, member of the bar of New York and Mexico, and published by the American Foreign Law Association in 1937.

The *Guide to the Law and Legal Literature of Cuba, the Dominican Republic and Haiti* is a cloth-bound volume of 276 pages. It may be purchased from the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C. for $1.75 a copy.

PERIODICALS *

Philosophy of Law and Government

W. M. Horton, "Natural Law and International Order"—*Christendom*, IX (1944), 2-21 (a Protestant view; although opposing the "monopoly" of the Catholic doctrine, the author admits that Protestantism often mishandled the idea of Natural law and that the rationalist, democratic conception of the Natural law has resulted in a failure).

P. Ramsay, "Natural Law and the Nature of Man"—*ibid.*, 369-381 (expounds the basic concepts of Protestant philosophical anthropology).

Chr. Dawson, "Peace Aims and Power Politics"—*Dublin Review*, CVIII (1944), 97-108 (measures some recent theories on the balance of power as against the papal peace program).

A. H. Chroust, "The Philosophy of Law of St. Augustine"—*Philosophical Review*, LIII (1944), 195-202.

L. García Arias, "Pio XII y el orden internacional"—*Razón y Fe*, CXXVIII (1943), 11-33.

J. C. Ford, S.J., "The Morality of Obliteration Bombing"—*Theological Studies*, V (1944), 261-309 (concludes that obliteration bombing is an immoral attack on the rights of the innocent; that it includes a direct intent to do them injury; and that even without this intent it still would be immoral because no proportionate cause would justify the evil done).

Public Ecclesiastical Law

J. C. Fenton, "Vicarius Christi"—*American Ecclesiastical Review*, CX (1944), 459-470 (an answer to Patriarch Sergej of Moscow and to Reinhold Niebuhr on the true history and meaning of the term, Vicar of Christ, as used from the Roman Synod of 495 A. D. onwards).

J. J. Coyne, "Rome and the Primacy"—*Clergy Review*, XXIV (1944), 202-206 (on the relation between the city of Rome and the See of the Supreme

* The reviewer regrets the incompleteness of the present report in that not all recent numbers of some of the foreign magazines reviewed (*Australasian Catholic Record, Ciencia Tomista, Irish Ecclesiastical Record, Razón y Fe*) have arrived in this country.

Pontiff; the author shows that the choice of Rome by St. Peter, though not strictly *iure divino,* is based on more than a *ius mere humanum* and that this choice is now irrevocable).

Recent Papal Enactments and Activities

J. D. Hannan, "A Review of Papal Documents of 1940"—*American Ecclesiastical Review,* CXI (1944), 53-58; "Papal Documents in 1941"—*ibid.,* 189-198; "Papal Documents of 1942"—*ibid.,* 367-379.

J. Nabuco, "Inovações Canônico-Litúrgicas"—*Revista Eclesiástica Brasileira,* IV (1944), 299-304 (reviews recent papal legislation and decrees of Roman Congregations on indulgences, papal blessing, use of *antimensia* [cf. can. 823, § 2], afternoon Mass, eucharistic fast, use of spittle in the baptismal liturgy, and holy oils).

F. Card. Tedeschini, "A caridade do Papa para com os prisioneiros de guerra"—*ibid.,* 383-389 (abstracts from a lecture given by Cardinal Tedeschini in the *Istituto di Studi Romani,* Rome, on the functioning of the Vatican Department of Information on Prisoners of War).

Constitution of Protestant Churches

Th. O. Wedel, "Church Order and the Historic Episcopate"—*Christendom,* IX (1944), 449-61 (the Anglican concept of the Episcopate).

H. H. Kramm, "Organization and Constitution of the German Protestant Churches"—*Church Quarterly Review,* CXXXVIII (1944), 87-98.

G. H. Stevenson, "Church and State in England and Scotland"—*Theology,* XLVI (1943), 122-127; 150-155.

Religious

Frei Aleixo, O.F.M., "Entêrro de Terceiros"—*Rev. Eccles. Bras.,* IV (1944), 419-427 (norms governing the funeral and burial of tertiaries).

O. de Oliveira, "Para ouvir de confissão as Filhas de Caridade ou Vicentinas requer-se peculiar jurisdição?"—*ibid.,* 397-400 (because of a special papal privilege granted to the Vincentian Sisters, any diocesan priest having ordinary faculties may licitly and validly hear their confessions).

A. C. Ellis, S.J., "The Care of Sick Religious"—*Review for Religious,* III (1944), 167-174 (discusses the *Normae* established on June 28, 1901 by the Congregation of Bishops and Regulars; the dispensation from eucharistic fast, can. 858, § 2, and related topics).

A. C. Ellis, "Dowry of Religious Women"—*ibid.,* 224-239 (a short commentary on canons 547-551).

A. C. Ellis, "The Bursar General of a Religious Institute"—*ibid.,* 329-334 (a short commentary on can. 516).

Penance

J. J. Nevin, "Validity of Absolution in Case of Generic Confessions and When Some Sins Escape the Notice of the Confessor"—*Australasian Catholic Record,* XXI (1944), 104-111.

Marriage

A. Gits, S.J., "The Instruction of the Faithful on Mixed Marriages"—*Clergy Review,* XXIV (1944), 355-358.

J. P. Donovan, "Congregationalist Baptism and Conjugal Liberty"—*Homiletic and Pastoral Review,* XLIV (1944), 829-832; 886-890 (holds that it results from the Congregationalist ritual that this sect does not consider baptism a sacramental cause of regeneration; that therefore Congregationalist baptism is presumably invalid to the effect of warranting the application of the Pauline privilege; holds also that a marriage between a certainly or doubtfully baptized non-Catholic and an unbaptized person requires no dispensation from the natural bond but is invalid if and when in an extrajudicial investigation the consent is found to have been dubious).

J. P. Kelly, "Juridical Legerdemain"—*ibid.,* XLV (1944), 46-48 (takes issue with the renewed assertion of Dr. Donovan [*ibid.,* XLIV, 856, in the answer to a query] that the "non-existence of the fact of marriage" in case of "accepting a divorce tradition" or of the use of a heretical ritual needs no judicial proof but only an extrajudicial declaration of nullity).

J. P. Donovan, "Exact Canonical Knowledge Can Appear Legerdemain"—*ibid.,* 103-107 (insists on the correctness of his view which he believes to be supported also by an analogy drawn from the invalidity of Anglican orders).

J. J. Clifford, S.J., "Marital Rights of the Sinfully Sterilized"—*Theological Studies,* V (1944), 141-158.

Magisterium

P. H. Furfey, "Intercredal Co-operation: Its Limitations"—*Amer. Eccles. Rev.,* CXI (1944), 161-175 (criticizes some of the views and statements of Dr. Parsons and Father Murray [cf. The Jurist, IV, 181] as reading too much into recent papal pronouncements on co-operation with non-Catholics in the secular field).

F. J. Connell, "Communication with Non-Catholics in Sacred Rites"—*ibid.,* 176-188.

M. Bévenot, S.J., "The Basis of Co-operation"—*Clergy Review,* XXIV (1944), 248-254.

History of Canon Law

E. Honigmann, "The Original Lists of the Members of the Council of Nicaea, the Robber-Synod and the Council of Chalcedon"—*Byzantion,* XVI (American Series, II), i (1942-43), 20-80 (continuing his previous studies on the subject [cf. *Byzantion* XI (1936), 440-449], the author corrects the list of the Fathers of Nicaea, and reconstructs from Greek, Latin and Syrian sources the lists for the other two synods, with historical details especially on the Fathers of Chalcedon).

E. A. Ryan, S.J., "The Problem of Persecution in the Early Church"—*Theological Studies,* V (1944), 310-339 (first of a series of articles on the

Catholic doctrine regarding the use of force against heretics; the author examines in particular the social and religious circumstances which prompted St. Augustine to approve of coercive means in the repression of the Donatist heresy, and warns against measuring the attitude of St. Augustine with modern concepts).

R. M. Honig, "The So-called 'Vicariate' of Illyricum"—*Anglican Theological Review,* XXVI (1944), 87-98 (starting from the premise of a "democratic feature of early Christianity," the author asserts that the Illyrian Church was originally an autonomous "diocese" [in the late Roman sense of a unit composed of several provinces], in which Constantinople had certain prerogatives by virtue of *Cod. Th.* 16, 2, 45, but no jurisdiction; that only the temporary change of political boundaries between the Eastern and the Western Empire, from 380 to 395 A. D., prompted the erection of a Vicariate by Pope Damasus; that the term, Vicariate, is altogether incorrect; and that the papal "claims" were opposed to the "constitutional rights as established through the canons"[1]).

F. X. Bockey, O.F.M., "Os Vigarios Cooperadores na História"—*Rev. Ecles. Brasil.* IV (1944), 336-378 (studies the origin of parochial assistants in the medieval Church; the connection of the institute with certain features of the law of benefices; the various names used in the Middle Ages for assistants, and the various types of *vicarii* known in the old law; Pirhing seems to be the first canonist to have distinguished parish assistants from all other kinds of temporary or perpetual vicars; the nature of the delegated power of assistants before the Code is discussed in detail).

A. Gwynn, S.J., "Papal Legates in Ireland during the Twelfth Century: I. Bishop Maol Muire ó Dunáin"—*Irish Ecclesiastical Record.* 5, LXIII (1944), 361-370 (shows that the Bishop of Meath, when presiding over the Synod of Cashel in 1101, had truly legatine powers as can be seen from a generally overlooked source in *Senchas Síl Bhriain;* that he retained these powers for ten years; and that the use of resident permanent legates for Ireland, from 1101 to the Norman Invasion, can be proved).

Chas. E. Smith, "Clerical Violence in the Pontificate of Innocent III"—*Journal of Religion,* XXIV (1944), 37-41 (studies a dozen letters of Pope Innocent III concerned with cases of homicide or other violent acts committed by clerics; the author is, however, more interested in the factual and social background of the cases than in their canonical significance, or than in a complete listing of the pertinent decretals available).

A. Wyse, O.F.M., "The *enquêteurs* of Louis IX"—*Franciscan Studies,* XXV (1944), 34-62 (describes origin and functioning of the *enquêteurs* instituted by St. Louis as travelling officials with the purpose of redressing administrative and judicial wrongs and inquiring into corrupt practices; investigates the employment of Mendicants in this office).

[1] A thorough refutation of the incorrect assumptions and conclusions presented in the article would be desirable; especially since the author bypasses the results of modern research (Streichhan, Granie, Silva-Tarouca, etc.).—Reviewer's note.

C. H. McIlwain, "The Present Status of the Problem of the Bracton Text" —*Harvard Law Review,* LVII (1943), 220-237 (reviews the recent opinions, prompted by Woodbine's edition and by Kantorowicz's book[2] on the reliability of Bracton's text as preserved; on Bracton's knowledge of Roman and Canon law; advocates a detailed study of the influence of the Glossators in England).

H. G. Richardson, "Azo, Drogheda, and Bracton"—*English Historical Review,* LIX (1944), 22-47 (presents new evidence for the year 1254 as *terminus a quo* of Bracton's treatise, against the earlier date proposed by Kantorowicz; re-establishes the traditional view on the influence of the canonist, William of Drogheda, on Bracton; discovers other canonical influences in Bracton, e.g. his dependence upon St. Raymond of Peñafort's *De matrimonio;* re-appraises the status and significance of the English law schools in the thirteenth century).

C. E. Odegaard, "Two Errant Papal Briefs for Siena"—*Speculum,* XIX (1944), 63-67 (on two unknown papal briefs preserved in the University of Illinois Library: Callixt III, February 12, 1457 and Paul II, September 2, 1464).

R. M. Huber, O.M.Cap., "The Historical Background of the Council of Trent"—*Amer. Eccles. Rev.,* CX (1944), 193-202.

F. Cereceda, S.J., "El 'litigio de los cabildos' y su repercusión en las relaciones con Roma (1551-1556)"—*Razón y Fe,* CXXX (1944), 215-234 (a detailed study on the exemption of the Spanish cathedral chapters from episcopal visitation, which persisted by virtue of special papal privileges even after general decrees to the contrary had been passed by the Council of Trent in 1546 and 1551; on the ensuing litigation of the chapters with the Spanish bishops; the diplomatic negotiations with the Roman Curia; the views of Melchior Cano, Domingo de Soto, and St. Ignatius on the merits of the case; and the regrettable consequences of the wavering policy adopted by Pope Paul IV in the question at issue).

A. Figueras, O.P., "La escuela dominicana en la legislación de Indias"—*Ciencia Tomista,* LXV (1943), 144-170 (studies the causes which led to the admission of enslavement of the Indians in the Spanish legislation of the sixteenth century; the support given by some, and the opposition expressed by other Spanish Dominicans to the policy of the Crown; shows how and why the solemn declaration of Pope Paul III on the rights of the Indians met with little success).

"Vingt-cinquième anniversaire du Code de droit canonique"—*Revue de l'Université d'Ottawa,* XIV (1944), section spéciale, 141-174 (addresses and papers read at the celebration of the Silver Jubilee of the Code in Ottawa; including a lecture by R. Charland, O.P., on "Les décrétales de Grégoire IX et le Code pio-bénédictin," pp. 145-166).

[2] Cf. also the articles reviewed in The Jurist, III (1943), 514, and the study on "A New Approach to Bracton" by F. Schulz in Seminar, II (1944), 41-50. —Reviewer's note.

History of Non-Catholic Ecclesiastical Law

R. Salomon, "Patriarch Nikon and the Russian Church"—*Anglican Theological Review,* XXVI (1944), 193-204 (a popularizing and misleading account of the history of Patriarch Nikon, 1605-1666).[3]

A. L. Drummond, "Church and State in Protestant Germany before 1918: with Special Reference to Prussia"—*Church History,* XIII (1944), 210-229.

Stephan Kuttner

The Catholic University of America

[3] Apart from the author's cynical attitude which does not recognize any factors in Church history but politics and ambition (see e.g., p. 197: "Nikon accepted [the patriarchal dignity], of course, after the usual formality of 'nolo episcopari' which is common to East and West . . ."), and from a bias which can see, e.g., in the Union of Florence, 1439, only the "humiliating step of signing a capitulation to the hated Latins" (p. 195), the article contains several serious mistakes on the origins of the Russian Church, on the attitude of the Catholic Church towards the vernacular languages, on the canonical difference between metropolitans and archbishops in the East; nor are the canonical and theological implications of Nikon's teaching on the Two Powers, or the uncanonical nature of his deposition (cf. the article by M. Spinka, reviewed in The Jurist, II [1942], 319) in any way recognized.—Reviewer's note.

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Back Numbers of The Jurist Needed.

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Chronicle

GENERAL

One hundred and three members of the hierarchy in the United States, meeting in Washington, D. C., November 15-16, elected members of the Administrative Board of the National Catholic Welfare Conference as follows: Chairman, Most Rev. Edward Mooney, D.D., Archbishop of Detroit; Vice Chairman and Treasurer, Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago; Secretary, Most Rev. Francis J. Spellman, D.D., Archbishop of New York; Episcopal Chairman of the Department of Education, Most Rev. John T. McNicholas, O.P., D.D., Archbishop of Cincinnati; Episcopal Chairman of the Legal Department, Most Rev. Joseph F. Rummel, D.D., Archbishop of New Orleans; Episcopal Chairman of the Department of Catholic Action Study, Most Rev. John J. Mitty, D.D., Archbishop of San Francisco; Episcopal Chairman of the Press Department, Most Rev. John G. Murray, D.D., Archbishop of St. Paul; Episcopal Chairman of the Department of Lay Organizations, Most Rev. John F. Noll, D.D., Bishop of Fort Wayne; Episcopal Chairman of the Department of Social Action, Most Rev. Karl J. Alter, D.D., Bishop of Toledo; Episcopal Chairman of the Youth Department, Most Rev. James H. Ryan, D.D., Bishop of Omaha.

Bishops assisting in the various Departments were appointed as follows: Press Department, Most Rev. Thomas K. Gorman, D.D., Bishop of Reno; Department of Lay Organizations, Most Rev. Emmet M. Walsh, D.D., Bishop of Charleston; Department of Education, Most Rev. F. P. Keough, D.D., Bishop of Providence; Department of Catholic Action Study, Most Rev. John F. O'Hara, C.S.C., D.D., Military Delegate; Department of Social Action, Most Rev. Charles H. LeBlond, D.D., Bishop of St. Joseph; Legal Department, Most Rev. Bryan J. McEntegart, D.D., Bishop of Ogdensburg; Youth Department, Most Rev. Richard O. Gerow, D.D., Bishop of Natchez; assistant Treasurer, Most Rev. William D. O'Brien, D.D., Auxiliary Bishop of Chicago.

Most Rev. Bryan J. McEntegart, D.D., was elected a member of the Bishops' Committee on Motion Pictures, succeeding Most Rev. Stephen J. Donahue, D.D., Auxiliary Bishop of New York, who retired. Most Rev. Sidney M. Metzger, D.D., Bishop of El Paso, was elected a member of the Bishops' Committee on the Montezuma Seminary for the training of Mexican candidates for the priesthood, succeeding Most Rev. Peter L. Ireton, D.D., Coadjutor Bishop of Richmond, who retired. Other members of the latter Committee, reelected, are Most Rev. John Mark Gannon, D.D., Bishop of Erie, Chairman; Most Rev. Edwin V. Byrne, D.D., Archbishop of Santa Fe; Most Rev. Francis C. Kelley, D.D., Bishop of Oklahoma City-Tulsa; Most Rev. James A. Griffin, D.D., Bishop of Springfield in Illinois; Most Rev. Joseph H. Schlarman, D.D., Bishop of Peoria; and Most Rev. William D. O'Brien, D.D.

The Bishops' Committee on the Confraternity of Christian Doctrine was reelected for another year as follows: Most Rev. Edwin V. O'Hara, D.D., Bishop of Kansas City, Chairman; Most Rev. John T. McNicholas, O.P., D.D.; Most Rev. Christian H. Winkelmann, D.D., Bishop of Wichita; and the Most Rev. James E. Kearney, D.D., Bishop of Rochester.

The Bishops' Committee on Decency in Literature was also reelected as follows: Most Rev. John F. Noll, D.D., Bishop of Fort Wayne, Chairman; Most Rev. Urban J. Vehr, D.D., Archbishop of Denver; Most Rev. Joseph E. Ritter, D.D., Archbishop of Indianapolis; Most Rev. Edward F. Hoban, D.D., Coadjutor Bishop of Cleveland; Most Rev. Bernard J. Sheil, D.D., Auxiliary Bishop of Chicago.

Most Rev. Edward Mooney, D.D., was elected to replace Most Rev. Joseph F. Rummel, D.D., on the Committee for the North American College, Rome.

The Bishops' Committee on the Propagation of the Faith was reelected for another year with Most Rev. Francis J. Spellman, D.D., as Chairman.

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In the annual report of the various Departments of the National Catholic Welfare Conference, the Legal Department noted its efforts in behalf of the retention of the ruling of the Bureau of Internal Revenue to the effect that members of religious communities are not liable to the payment of income taxes on remuneration received solely as agents of the religious community. Also recorded was the suggestion of amendments to a bill to provide a Federal-State system of child care, which was passed by the Senate but is still pending in the House of Representatives. It was further indicated that the Department has cooperated with the National Council of Catholic Women in opposing the so-called Equal Rights Amendment now pending in Congress.

The general report for the Conference indicated that subscriptions to the republication of the *Acta Apostolicae Sedis* have been obtained from thirty-eight countries. The report of the Press Department stated also that five new publications have subscribed to the News Service, and that its dispatches are going to thirty-two countries.

The Social Action Department noted that five regional Industrial Conferences were held during the year: at Richmond, Chicago, Toledo, Brooklyn, and Butte; that it contributed to the formulation of the "Pattern for Peace"; that it conducted Seminars on the Spanish-speaking People of the Southwest and West at San Antonio and Denver.

The Department of Education reported that forty-five Catholic colleges offered 181 scholarships for Latin American students at a value of $72,286. The Youth Department noted that 63 of the 108 dioceses in which schools with military training were located had appointed campus supervisors; and that 102 of a possible 114 dioceses have appointed diocesan directors of youth groups.

The Department of Lay Organizations reported that 2,195 organizations are now affiliated with the National Council of Catholic Men, two new diocesan councils being noted; that two booklets promoting its work were distributed; that 187 newspapers are now using the releases of the Narberth Movement, 17 new ones having been added during the year; that the Catholic Hour is

being carried by 89 stations; that nearly 2,000,000 pamphlets have been distributed in connection with the Catholic Hour; that a new radio program, the Hour of Faith, is being carried by 41 stations; that the theme for forty-two diocesan conventions and two State conventions of the National Council of Catholic Women has been "The Family"; that this group sponsored a national conference in February on "Promoting Better Race Relationships", attended by representatives of thirty national organizations; that at all its meetings, diocesan, State and national, sessions are devoted to the Papal Peace Program; that twenty-two of its diocesan councils are devoted to special war relief activities; and that the enrollment of the National Catholic School of Social Service was 109, ten of whom came from Latin-American countries.

The Committee on the Confraternity of Christian Doctrine reported that two new diocesan directors have been appointed, bringing the total to 108; that 1,345 copies of the *Manual* were distributed; that institutes were held for officers and workers in more than thirty dioceses; that five pamphlets of the Confraternity were translated into Spanish in Montezuma Seminary; and that 200,000 pieces of literature were distributed to Confraternity officers and members.

The National Catholic Community Service was reported as conducting 450 clubs with a personnel of 645, sixty of the clubs being for negroes; as having expended $1,302,407 for about 27,000,000 religious articles, and as having spent about $100,000 in supplying a monthly average of 177 priests to serve as auxiliary chaplains.

The Legion of Decency reported that of the total number of films reviewed, 191 were of Class A-I, 184 of Class A-II, 51 of Class B, and 3 of Class C.

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Very Rev. Msgr. Howard J. Carroll, D.D., has been elected General Secretary of the National Catholic Welfare Conference, succeeding Most Rev. Michael J. Ready, D.D., Bishop of Columbus.

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The National Catholic Welfare Conference War Relief Services, acting through Most Rev. Edward Mooney, D.D., Archbishop of Detroit, Chairman of its Board of Trustees, reports that over 6,000,000 pounds of clothes for Italy were collected and over 12,000,000 pounds in connection with the nation-wide appeal of the United Nations Relief and Rehabilitation Administration through its efforts in the dioceses throughout the United States. About 20,000,000 articles were involved and 200,000 pairs of shoes. In addition the organization made about 4,000 shipments of relief and service materials valued at more than $3.000,000, including about 9,000,000 articles. Service rendered was chiefly in behalf of war victims, prisoners of war of both combatants, merchant seamen, and soldiers of the Polish army.

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A statement made in the name of all the members of the hierarchy of the United States was issued after the annual meeting in November at The Catholic University of America. It was signed by the ten members of the hierarchy who constitute the Administrative Board of the National Catholic Welfare Conference. It rejected power politics and expressed its lack of confidence in a peace that was not based on the principles of the Atlantic Char-

ter or in an international league that did not include all nations, weak as well as strong, or failed to provide a world court to which the justiciable suits among nations could be submitted, and the decisions of which would be enforced by the world organization, though always without violation of the rightful sovereignty of nations but with concern for the ideology of the individual nations in their internal life. The world organization should be animated by Christian democratic traditions which should also be incorporated in a code of international law, and should demand that every nation guarantee in law and respect in fact the innate rights of men, families, and minority groups, and their civil and religious life. At their meeting, the hierarchy also voiced opposition to the immediate passage of a compulsory training act and suggested that action be withheld until the end of the war.

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The yearly meeting of the Catholic Church Extension Society met in Chicago with fifty members of the hierarchy in attendance. Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago, Chancellor of the Society, presided. The President, Most Rev. William D. O'Brien, D.D., Auxiliary Bishop of Chicago, reported that $800,000 had been expended by the Society during the year.

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At a meeting of the American Board of Catholic Missions, held in Chicago, $757,000 was voted to meet the missionary needs of dioceses in the United States, according to the report of Most Rev. John F. Noll, D.D., Bishop of Fort Wayne, treasurer, who also indicated that the collections were close to $1,000,000, including the interest on treasury funds.

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On December 13, our Holy Father observed his golden jubilee as a sodalist and sodalists throughout the United States and Canada participated in the observance through a triduum preceding the Feast of the Immaculate Conception for the intentions of our Holy Father.

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Sir Samuel Runganadhan, high commissioner for India in London, a member of the Church of India and Burma which is essentially Anglican, was given a private audience by our Holy Father.

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Our Holy Father gave the absolution after the Mass celebrated by His Eminence, Pietro Cardinal Fumasoni-Biondi, for the Cardinals who died during the preceding year: Cardinals Carlo Cremonesi, William O'Connell, and Luigi Maglione.

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On October 26, His Excellency, the Most Reverend Apostolic Delegate, celebrated the solemn Pontifical Mass at the dedication of the Cathedral Center in Erie, including the new Cathedral preparatory school for boys. The sermon was preached by Most Rev. Edward F. Hoban, D.D., Coadjutor Bishop of Cleveland. At the ceremony it was announced that Most Rev. John M. Gannon, D.D., the Bishop of Erie, had been made Assistant at the Pontifical Throne, with the title of Roman Count.

Most Rev. Karl J. Alter, D.D., Bishop of Toledo, celebrated a solemn Pontifical Mass in Lima, Peru, on December 3, opening the second regional institute of the Inter-American Hospital Association, of which he was also one of the speakers.

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On September 12-14, the thirteenth annual meeting of the National Catholic Evidence Conference was held in Chicago under the auspices of Most Rev. Samuel A. Stritch, D.D., Archbishop of Chicago, who addressed the meeting on the topic, "The Inspiration and Sustaining Force of the Apostolate." Most Rev. Edwin V. O'Hara, D.D., Bishop of Kansas City, Missouri, addressed the delegates on the subject, "Keeping Contact with Men of Good Will"; and Most Rev. John F. Noll, D.D., Bishop of Fort Wayne, on the subject, "The Modern Approach to Our Non-Catholic Countrymen."

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The ninth annual meeting of the Archdiocesan and Diocesan Directors of The Confraternity of Christian Doctrine was held at St. Mary's College, South Bend, on August 24-25. In attendance were Most Rev. Edwin V. O'Hara, D.D., Bishop of Kansas City, Missouri, and Most Rev. James E. Kearney, D.D., Bishop of Rochester.

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The 22nd annual convention of the National Catholic Rural Life Conference was held in Cincinnati November 10-13, with the central theme of post-war problems affecting persons living in rural communities. Most Rev. Joseph H. Schlarman, D.D., Bishop of Peoria, was reelected President.

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On August 22-23 The Catholic Biblical Association of America met in St. Mary's College, South Bend, Indiana, attended by some sixty Scriptural scholars. Most Rev. Edwin V. O'Hara, D.D., Bishop of Kansas City, Missouri, attended.

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The National Council of Catholic Women held its 22nd annual convention in Toledo October 21-25, considering as a central theme international and inter-American cooperation, asserting the right of Poland to its integrity, approving the "Pattern for Peace," and disapproving of permanent military training except as a last resort. Mrs. Thomas G. Garrison, of Golden, Colorado, was elected National President.

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Most Rev. Edward F. Hoban, D.D., Coadjutor Bishop of Cleveland, formally opened in early October a convention of the Polish Catholic League with a Pontifical Mass in St. John's Cathedral. The sermon was delivered by Most Rev. Stephan W. Woznicki, D.D., Auxiliary Bishop of Detroit. A rally was addressed by Bishop Hoban and by Most Rev. Stanislaus V. Bona, D.D., Bishop of Grand Island.

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The 1944 Liturgical Week was observed in New York City, December 27-29, under the chairmanship of Rt. Rev. Msgr. Joseph P. Donahue, Vicar

General. Solemn services were held in St: Patrick's Cathedral on December 28 and 29.

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The American Catholic Historical Association held its silver jubilee meeting in Chicago on December 28-29.

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On September 13-14, the Missionary Union of the Clergy held sessions in New York City, opening with Mass celebrated by Most Rev. J. Francis A. McIntyre, D.D., Auxiliary Bishop of New York. The theme address, "The Apostolate of Vocations," was delivered by Most Rev. William A. Griffin, D.D., Bishop of Trenton.

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On December 20, Most Rev. John J. Glennon, D.D., Archbishop of St. Louis, celebrated the diamond jubilee of his sacerdotal ordination; in a little more than a year he will be celebrating the golden jubilee of his consecration. $1,000,000 for additional interparochial high schools have been pledged to him as a gift by five hundred priests and laymen of the Archdiocese.

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The Apostleship of Prayer celebrated the centenary of its foundation on December 3, the Feast of St. Francis Xavier.

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On October 12, the golden jubilee of St. Paul's Seminary, St. Paul, Minnesota, was celebrated, with fourteen members of the hierarchy in attendance.

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The Jesuit House of Studies at Woodstock, Maryland, observed its seventy-fifth anniversary with a two-day celebration, a Pontifical Mass of Thanksgiving celebrated by Most Rev. Michael J. Curley, D.D., Archbishop of Baltimore-Washington, opening the observance, and a Pontifical Mass of Requiem for deceased alumni, celebrated by Most Rev. John M. McNamara, D.D., Auxiliary Bishop of Baltimore-Washington, the chief event of the second day.

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Generalissimo Chiang Kai-shek in a special interview with Most Rev. James E. Walsh, D.D., Superior General of Maryknoll, requested him to invite more American missioners to China after the war.

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Five hundred members of the bar in Brussels assisted at Mass offered in the Church of Our Lady of Sabion, opening the judicial year, and a statue of St. Ives, patron of lawyers, was unveiled in front of the Palais de Justice at a ceremony following the Mass.

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Carmelite priests and nuns offered Masses of Thanksgiving on October 3 for the almost miraculous escape of the property and religious of the community at Lisieux which, as a Nazi communication center, was subjected to sixteen bombing attacks.

The liberation of Paris was commemorated by a Mass of Thanksgiving celebrated in the Cathedral of St. Matthew, Washington, D. C., by Most Rev. John McNamara, D.D., Auxiliary Bishop of Baltimore-Washington.

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The Government of Eire has issued a stamp in commemoration of the centenary of the death of Brother Edmund Ignatius Rice, founder and first Superior General of the Irish Christian Brothers, whose rule was approved in 1822.

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On November 3, funeral services were held in Rome for the repose of the soul of Monsignor Giulio Graziolo, Dean of the Sacred Roman Rota, who died at the age of 82, being succeeded as Dean by Monsignor Andre Julien, who has been a member since 1922.

Monsignor Dino Staffa fills the vacancy on the Sacred Roman Rota occasioned by the death of Monsignor Giulio Graziolo.

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A solemn Pontifical Mass of Requiem was celebrated in the Shrine of the Immaculate Conception, Washington, D. C., for the repose of the soul of Cardinal Maglione, late Papal Secretary of State, by the Most Rev. Apostolic Delegate, at which many government officials were present.

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On October 3, a solemn Pontifical Mass of Requiem was celebrated for the repose of the soul of Most Rev. John A. Duffy, D.D., Bishop of Buffalo, who died on September 27 at the age of 59, in the eighth year of his incumbency of that See to which he was promoted after ruling the See of Syracuse for four years. Most Rev. Thomas J. Walsh, D.D., Archbishop of Newark, celebrated a solemn Pontifical Mass in St. Joseph's Church, Jersey City, whither the body was taken for subsequent burial in Holy Name Cemetery, Jersey City.

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On November 6, a solemn Pontifical Mass of Requiem was offered in the Cathedral of the Immaculate Conception, Crookston, Minnesota, for the repose of the soul of the late Most Rev. John H. Peschges, D.D., Bishop of that See, who died on October 30 at the age of 63. The celebrant of the Mass was Most Rev. John G. Murray, D.D., Archbishop of St. Paul. The sermon was preached by Most Rev. Joseph H. Busch, D.D., Bishop of St. Cloud.

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Rt. Rev. Msgr. David T. O'Dwyer, previously Assistant Chancellor of The Catholic University of America, and later Director of the Shrine of the Immaculate Conception, died October 4 in Denver at the age of 66 of a heart attack.

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Rt. Rev. Peter M. H. Wynhoven, P.A., who died at the age of 59, was buried on September 19 at a Pontifical Mass of Requiem celebrated in Our Lady of Lourdes Church, New Orleans, by Most Rev. Joseph F. Rummel, D.D., Archbishop of New Orleans.

Most Rev. Francois Ricard, former Archbishop of Auch, and oldest member of the French hierarchy, has died at the age of 92.

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Rev. Charles H. Cloud, S.J., formerly President of the University of Detroit, of St. Louis University, and formerly Provincial of the Chicago Province of the Society of Jesus died in mid-October, and was buried from the Gesu Church, Detroit.

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Rt. Rev. James M. Ryan, Consultor of the Diocese of Columbus, died late in October at the age of 61.

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Rt. Rev. Msgr. Antonio Maria Santandreu, oldest priest on the Pacific coast, died at the age of 91, in the sixty-ninth year of his priesthood.

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Rt. Rev. Msgr. Joseph D. Creeden, who died as pastor of Holy Family Church, Watertown, New York, at the age of 73, was buried with a solemn Pontifical Mass at which Most Rev. Bryan J. McEntegart, D.D., Bishop of Ogdensburg, was celebrant.

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On October 7, Most Rev. J. Francis A. McIntyre, D.D., Auxiliary Bishop of New York, celebrated a Pontifical Mass of Requiem for the repose of the soul of the late ex-Governor Albert Smith, at which thirteen members of the hierarchy assisted. The sermon was preached by Rt. Rev. Joseph P. Donahue, Vicar General of the Archdiocese of New York.

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Dr. Alexis Carrel died November 5 in Paris. He had received the last Sacraments two weeks before his death, and was buried from St. Francois Church, Paris. He was a member of the Pontifical Academy of Sciences.

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Dr. George D. Birkhoff, a member of the Pontifical Academy of Sciences, and internationally prominent mathematician, died at Cambridge, Massachusetts, at the age of 60. He was Perkins Professor at Harvard University.

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Rev. Adrian J. Kilker, J.C.D., died at the end of December.

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Burke Walsh, of the National Catholic Welfare Conference, after a careful survey, makes the estimate that there are not more than 90,000 Protestants in Italy, some 20,000 Waldensians, who have consistently given the army many of its high officers, and who live chiefly in Piedmont. About 20,000 Lutherans and Evangelicals live in Northeast Italy. Florence is the most Protestant city. There are some 40,000 Jews in Italy, and about 10,000 persons professing other beliefs .

DIGNITIES

On November 8 Most Rev. Richard J. Cushing, D.D., was installed as Archbishop of Boston by the Most Rev. Apostolic Delegate in the Cathedral of the Holy Cross in the presence of nine archbishops and forty-seven bishops. The sermon was delivered by Most Rev. Francis P. Keough, D.D., Bishop of Providence.

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On December 14, Most Rev. Michael J. Ready, D.D., Bishop of Columbus, was consecrated in St. Matthew's Cathedral, Washington, D. C., by His Excellency, the Most Reverend Apostolic Delegate. The co-consecrating Bishops were Most Rev. John T. McNicholas, O.P., D.D., Archbishop of Cincinnati, and Most Rev. Edward F. Hoban, D.D., Coadjutor Bishop of Cleveland. The sermon was preached by Most Rev. Edward Mooney, D.D., Archbishop of Detroit. The Haitian Government conferred on Bishop Ready the diploma and insignia of "Honneur et Mérite" at a ceremony in the Haitian embassy. The installation ceremony will occur on January 4.

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The elevation of the See of Indianapolis to the rank of an Archdiocese occurred on December 19. His Excellency, the Most Reverend Apostolic Delegate celebrated the solemn Pontifical Mass marking the occasion in SS. Peter and Paul's Cathedral. The sermon was preached by Most Rev. John T. McNicholas, O.P., D.D., Archbishop of Cincinnati.

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On December 21, Most Rev. Henry Grimmelsman, D.D., was consecrated first Bishop of the See of Evansville by His Excellency, the Most Rev. Apostolic Delegate in the Pontifical College Josephinum. The co-consecrating Bishops were Most Rev. Urban J. Vehr, D.D., Archbishop of Denver, and Most Rev. George J. Rehring, D.D., Auxiliary Bishop of Cincinnati. The sermon was preached by Most Rev. John T. McNicholas, O.P., D.D., Archbishop of Cincinnati.

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Most Rev. Edward F. Ryan, D.D., Bishop-elect of Burlington, will be consecrated in the Cathedral of the Holy Cross, Boston, on January 3, by Most Rev. Richard J. Cushing, D.D., Archbishop of Boston. The co-consecrators will be Most Rev. Francis J. Spellman, D.D., Archbishop of New York, and Most Rev. Francis P. Keough, D.D., Bishop of Providence. The sermon will be delivered by Most Rev. Matthew F. Brady, D.D., Bishop of Manchester, whom Bishop-elect Ryan succeeds as Bishop of Burlington.

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On January 10, according to tentative plans, Most Rev. Eugene J. McGuinness, D.D., Coadjutor Bishop of Oklahoma City and Tulsa will be installed in the Cathedral of Our Lady of Perpetual Help in Oklahoma City.

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On January 10, Most Rev. John G. Bennett, D.D., will be consecrated first Bishop of Lafayette by Most Rev. John F. Noll, D.D., Bishop of Fort Wayne. The installation will occur on January 18.

On January 10, Most Rev. William T. Mulloy, D.D., Bishop-elect of Covington, will be consecrated in St. Mary's Cathedral, Fargo, North Dakota, by Most Rev. Aloisius J. Muench, D.D., Bishop of Fargo; the co-consecrating Bishops will be Most Rev. Vincent J. Ryan, D.D., Bishop of Bismarck and Most Rev. Peter W. Bartholome, Coadjutor Bishop of St. Cloud. Most Rev. John G. Murray, D.D., Archbishop of St. Paul, will preach the sermon.

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On January 11 Most Rev. Ralph L. Hayes, D.D., Bishop-elect of Davenport, will be installed in Sacred Heart Cathedral, Most Rev. Henry P. Rohlman, D.D., Coadjutor Archbishop of Dubuque and former Bishop of Davenport, presiding.

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On January 17, the installation of Most Rev. Matthew F. Brady, D.D., as fourth Bishop of Manchester, will take place, Most Rev. Richard J. Cushing, D.D., Archbishop of Boston, presiding. The sermon will be preached by Most Rev. Francis P. Keough, D.D., Bishop of Providence.

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Most Rev. Stanislaus V. Bona, D.D., Bishop of Grand Island, has been appointed Coadjutor Bishop of Green Bay with right of succession, and Titular Bishop of Mela. The incumbent of the See of Green Bay is Most Rev. Paul P. Rhode, D.D., who has occupied the See since 1915.

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Most Rev. Francis J. Spellman, D.D., Archbishop of New York, has been named by President Roosevelt as a member of the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, of which Associate Justice Owen J. Roberts is chairman and Huntington Cairns, general counsel of the National Gallery of Art, the secretary-treasurer.

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Most Rev. Humphrey Bright, D.D., British army chaplain, was appointed Titular Bishop of Soli and Auxiliary of Birmingham, succeeding the Most Rev. Bernard Griffin, now Archbishop of Westminster.

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Most Rev. Carlo Alberto Ferrero di Cavellerleone has been named Titular Archbishop of Trebisonde and Military Ordinary of Italy, succeeding Most Rev. Angelo Bartolomasi, who has resigned.

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At a solemn ceremony in the Cathedral at Guatemala, His Excellency, Most Rev. Giuseppe Baltrami, Papal Nuncio, consecrated three bishops: Most Rev. Miguel Angel Garcia y Arauz, Raimundo M. Martin, O.P., and Rafael Gonzalez y Estrada. They have been appointed Auxiliary Bishops, respectively of Guatemala, Verapaz, and Los Altos.

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Most Rev. Theodore George Romza, spiritual director of the seminary of Mukacevo, Hungary, has been named Titular Bishop of Appia and Auxiliary to the Apostolic Administrator of Mukacevo, by a rescript of the Sacred Congregation for the Oriental Church.

The See of Indianapolis has been raised to the dignity of an Archdiocese and two new suffragan Sees have been established subject to it, the Sees of Evansville and Lafayette. The See of Steubenville has also been established in the Province of Cincinnati.

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Most Rev. Timothy J. Crowley, C.S.C., Bishop of Dacca, has received the Kaiser-I-Hind gold medal from King George VI of England in recognition of his services rendered the natives of India through many years as a missionary and for his work in the recent Bengal famine.

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Very Rev. Msgr. D. V. Foley, has been named Vicar General of the Archdiocese of Dubuque, succeeding Rt. Rev. Msgr. Thomas Conry, P.A.

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Rev. Thaddeus S. Ziolkowski, J.C.D., has been made Chancellor of the Diocese of St. Cloud.

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Very Rev. Comerford J. O'Malley, C.M., has been named President of De Paul University, Chicago, succeeding Very Rev. Michael J. O'Connell, C.M., who has become Superior of his community in Chicago.

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The following priests have been made Protonotaries Apostolic. Diocese of Brooklyn: Rt. Rev. Msgr. Edward P. Hoar. Diocese of Des Moines: Rt. Rev. Msgr. L. V. Lyons, V.G.

The following priests have been appointed Domestic Prelates. Archdiocese of Detroit: Rt. Rev. Msgrs. Joseph S. Marx, John G. Cook, William P. Schulte, Adalbert B. Zadala, Stanley S. Skrzycki, Vincent T. Hankerd, John J. McCabe, Frank A. Pokriefka, John C. Vismara, Tobias G. Morin, G. Warren Peek, J. L. Linsenmeyer, and Thomas A. Connell. Diocese of Des Moines: Rt. Rev. Msgrs. Francis P. Larkin, James P. Danahey, Thomas P. Murphy, Jeremiah F. Costello, Michael B. Schlitz, and William J. McMahon.

Rev. Frederick G. Hochwalt, Director of the Department of Education, National Catholic Welfare Conference, has been made Papal Chamberlain with the title of Very Rev. Monsignor. The same dignity has been conferred on Rev. Donald M. Carroll, J.C.D., of the Archdiocese of Chicago.

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The League of Fraternal and Benevolent Organizations of the Jewish Educational Committee of New York has selected Associate Justice Murphy of the United States Supreme Court for an award to be made on January 28 in recognition of him as the American who has made the most significant contribution to humane brotherhood during the past year. President Roosevelt received the first award, and last year's award went to Professor Arthur H. Compton, Co-chairman of the National Conference of Christians and Jews.

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On September 17, Fordham University conferred the honorary degree of Doctor of Laws on Dr. H. H. Kung.

Jefferson Caffery, 57-year-old career diplomat, a convert, has been appointed representative of the United States with the personal rank of ambassador to the de facto French authority.

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In late September Arthur Bliss Lane was appointed American ambassador to the exiled Polish government.

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John C. Wiley of Indiana has been appointed United States Ambassador to Colombia. He was previously United States Minister to Latvia and Esthonia. Walter Thurston, formerly Ambassador to El Salvador, has been named United States Ambassador to Bolivia.

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Acting in the name of the Most Rev. Apostolic Delegate, Most Rev. Michael J. Ready, D.D., Bishop of Columbus, conferred the medal *Pro Ecclesia et Pontifice* on Miss Margaret T. Lynch, and the rank of Commander of the Order of St. Gregory on William Montavon, Frank A. Hall, and Bruce M. Mohler, officials of the National Catholic Welfare Conference.

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Francis P. Matthews, Supreme Knight of the Knights of Columbus and Chairman of the Executive Committee of the National Catholic Community Service, received from the hands of His Eminence, Cardinal Canali, Protector of the Order of the Holy Sepulchre, the insignia of Knighthood of the Order of the Grand Cross in that Order.

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Dr. Edward A. Doisy, professor of biochemistry in the St. Louis University School of Medicine, has been awarded the Nobel prize for his discovery of the chemical nature of the "K" vitamin.

THE CANON LAW SOCIETY OF AMERICA

On November 19, 1944, The Canon Law Society of America convened for its sixth annual meeting. The members in attendance assembled at 3:30 P. M. in the Hotel Pennsylvania, New York City. Despite current travel hardships some 80 members were present at the meeting. All the officers of the Society were in attendance: the Very Rev. Robert E. McCormick, J.C.D., of New York City, President; the Rev. Thomas H. Kay, J.C.D., of Albany, New York, Vice-President; the Rev. John R. Schmidt, J.C.D., of The Catholic University of America, General Secretary; the Rev. Francis E. Moriarty, C.Ss.R., J.C.D., of New York City, Recording Secretary; the Rev. Clement V. Bastnagel, J.U.D., Treasurer. At the close of the meeting a considerable number of the members participated in the dinner-meeting of the Reunion of the New Jersey and New York Chapters of the Alumni and Friends of The Catholic University of America at the Hotel Pennsylvania at 7:30 P. M.

Business Meeting

As President of the Society the Very Rev. Robert E. McCormick opened the meeting with prayer. He immediately called for the reading of the min-

utes of the last previous meeting. The Rev. Francis E. Moriarty, as Recording Secretary, thereupon read the account of the proceedings of the meeting which had been held on November 14, 1943. The minutes, as written by the Rev. Francis B. Donnelly, J.C.D., of Brooklyn, in his capacity of Recording Secretary at that meeting, were adopted without change or amendment. Next in order was the report of the President.

Report of the President

Pointing to the various series of lectures which had been planned in different parts of the country during the year 1943 in commemoration of the silver jubilee of the enactment of the Church's present code of law, the President reported on the favorable reception accorded to this undertaking wherein diversified aspects of Church law were brought to the attention of the Catholic legal profession. Centers at which such a lecture series was sponsored were: Washington, D. C., Camden, Detroit, Cincinnati and New York. In all instances Catholic lawyers constituted a gratifyingly representative part of the attendance. In Cincinnati there resulted the establishment of a Catholic Lawyers' Guild. In New York the Catholic Lawyers' Guild was co-sponsor with the Regional Unit of The Canon Law Society in the presentation of the lecture series, and has asked for another course of lectures for the Bar Association in the current year. Likewise the Westchester County Bar Association has requested a course of lectures under the auspices of the Knights of Columbus.

In the cities of Seattle, Kansas City, St. Louis, Detroit, Cleveland and New York specially prepared papers on topics of canonical import and interest were delivered to representative groups in attendance at regional meetings. The continued activity of this particular kind of endeavor was stressed as a most suitable means for actualizing the aims and purposes for which the Society exists. The interchange of canonical thought and opinion which results from such meetings was recognized by the President as engendering the distinctive kind of study and consultation which will serve the interests of a growing canonical jurisprudence.

Report of the Treasurer

The Rev. Clement Bastnagel presented the Treasurer's report.

During the year from November 14, 1943, to November 19, 1944, the Society had received from membership subscriptions ($3,415.58) and through interest ($33.58) a total of $3,449.16. Total expenditures amounted to $2,173.35. Thus there remained a favorable balance of $1,275.81. But the Society had on hand on November 14, 1943, the sum of $1,383.62. The present balance, then, was $2,659.43. Of this amount $2,033.58 was bearing interest from July 1, 1944. The present checking account of the Society correspondingly stood at $625.85.

With its current assets the Society still had to meet the cost of purchasing 7,150 copies of 21 different dissertations for distribution to the Society's membership. Only two of the 1942 approved set of canonical dissertations, as listed in the Canon Law Studies Series of The Catholic University of America, remained to be distributed; none of the 1943 set; but all of the 24 titles which make up the 1944 set.

In the year 1940-1941 the Society had purchased 1,950 copies of 11 different dissertations; in the year 1941-1942, 3,325 copies of 21 different dissertations; in the year 1942-1943, 4,225 copies of 19 different dissertations; in the year 1943-1944, 5,010 copies of 16 different dissertations. Of the 88 titles of dissertations approved by the School of Canon Law at The Catholic University of America during the past four years for publication, 67 titles aggregating a total of 14,510 copies had been purchased by the Society for distribution. The purchase of 21 titles aggregating 7,150 copies was still to follow with the delivery of these copies from the printers to the Society.

During the year 1943-1944 the members of the Society who paid the requisite minimum membership fee of $2.00 were entitled to select for delivery to them from the Society any four titles of the approved publication list of the year 1944. Members who paid $7.00 were entitled to select any fifteen titles of the list as designated by them. Additional titles or copies, if selected, were sold at the price of fifty cents apiece. Upon the recommendation of the Treasurer the members present at the meeting were asked to consider the approval of a flat rate of fifty cents apiece for any and each copy selected. This proposal was suggested with a view to making available a slight increase in funds in order that the Society might the more securely meet the somewhat advanced cost of printing, of envelopes and of postal rates. The plan was favorably received, and the assembly unanimously adopted its execution for the current year.

The present number of paid-up subscribers in the Society's membership was reported at approximately 400. Of this number about 30 subscriptions came from members resident in Canada.

Paper Read at the Meeting

Upon the conclusion of the business meeting the President introduced the Very Rev. Joseph A. Hickey, O.S.A., of Villanova, Pa., to the assembly. Father Hickey then delivered a carefully prepared address on "The requirements of the process for obtaining an apostolic dispensation *super matrimonio rato et non consummato.*" As a consultor in the Sacred Congregation of the Sacraments until the outbreak of war forced his return to this country, and as a teacher of the course on "The Procedural Practice in the Sacred Roman Congregations," as given to the graduate students of Canon Law at The Catholic University of America, Father Hickey was eminently qualified to outline in clear detail and to emphasize with proportionate stress the successive stages of the procedure as postulated in the process *super matrimonio rato et non consummato.* When the lucid presentation of the paper was concluded the President invited an open discussion from the floor. The discussion occasioned added demands on the well informed knowledge of the speaker. The following members took part in the discussion: the Revs. Vincent J. Baldwin, of Brooklyn; William Cavanaugh, C.P., of West Springfield, Mass.; Joseph Comyns, C.Ss.R., of Esopus, N. Y.; John Leo Dolan and Thomas A. Donnellan, of New York City; Francis B. Donnelly, of Brooklyn; Eugene A. Dooley, O.M.I., of Newburgh, N. Y.; Stanley E. Fedewa, of Detroit; James H. Griffiths, of Brooklyn; Stephen C. Gulovich, of Pittsburgh, Pa.; James P. Kelly, of New York City and John E. Maney, of Rochester, N. Y.

The discussion proved helpful for the clarification of certain intricate and disputed points. The address delivered by Father Hickey appears in the present number of THE JURIST.

ELECTION OF NEW OFFICERS

In accordance with the Society's standing practice the incumbent officers, as a nominating committee, submitted the names of candidates for the various offices. The balloting revealed the following candidates as elected: The Very Rev. Eric F. Mac Kenzie, J.C.D., *Officialis* of the Archdiocese of Boston as President; the Very Rev. James A. Hughes, J.C.D., Chancellor of the Archdiocese of Newark, as Vice-President; the Rev. Timothy J. Champoux, Assistant Chancellor of the Diocese of Springfield, Mass., as General Secretary; the Rev. John Leo Dolan, *Defensor Vinculi* in the Archdiocese of New York, as Recording Secretary; the Rev. Clement V. Bastnagel, Associate Professor in The Catholic University of America School of Canon Law, as Treasurer. In the absence of the newly elected President, which was occasioned by his recent appointment as pastor at Sacred Heart Church, 1321 Centre St., Newton Centre, Mass., the Very Rev. Vice-President assumed the President's chair. In the name of the President and the other newly elected officers the Vice-President, before the meeting adjourned, pledged the endeavors of the new board of officers to the tasks which the Society had entrusted to them for the coming year.

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The Second Annual Northwest Regional Meeting of The Canon Law Society of America was held at St. Edward's Seminary, Kenmore, Washington, on September 6, 1944, beginning at 10:30 a. m. Those present included Most Rev. Gerald Shaughnessy, S.M., S.T.D.; Very Rev. John P. McCormick, S.S., S.T.D., Ph.D., President of St. Edward's Seminary; Very Rev. Joseph P. Dougherty, M.A., Chancellor of the Diocese of Seattle; Very Rev. John E. Regan, M.A., Chancellor of the Diocese of Great Falls; Rev. John A. Delane, *Officialis,* Diocese of Helena; Rev. John J. Coleman, J.C.D., *Officialis,* Diocese of Spokane; Rev. John E. Prince, J.C.D., *Defensor Vinculi,* Diocese of Spokane; Rev. Thomas Brockhaus, O.S.B., J.C.L., Professor of Canon Law at Mt. Angel, Oregon; Rev. Raymond Peplinski, Diocese of Boise; Rev. James H. Brennan, S.S., J.C.D., *Defensor Vinculi* of the Diocese of Seattle and Professor of Moral Theology, St. Edward's Seminary; Rev. John J. Galvin, S.S., M.A., S.T.D., Professor of Dogma, St. Edward's Seminary; Rev. Charles A. Kerin, S.S., J.C.D., Professor of Canon Law, St. Edward's Seminary; Rev. Joseph L. Wolter, J.U.D., *Officialis,* Diocese of Seattle; Rev. A. L. Leahy, Advocate, Diocese of Seattle; Rev. Theodore P. Sullivan, Advocate, Diocese of Seattle; Rev. Cornelius M. Power, J.C.D., Vice Chancellor, Diocese of Seattle.

Presiding, was His Excellency, Most Rev. Gerald Shaughnessy, S.M., S.T.D.; Chairman was the Rev. James H. Brennan, S.S., J.C.D.; Secretary was the Rev. Cornelius M. Power, J.C.D.

The title of the paper read at the meeting was "The Emergency Powers of Canons 1043, 1044, 1045, and Some War Time Considerations." The author of the paper was the Rev. John E. Prince, J.C.D.

The quarterly meeting of The Canon Law Society of Greater Kansas City was held at Ward High School, Kansas City, Kans., Monday afternoon, September 18.

The Most Rev. Paul C. Schulte, Bishop of Leavenworth, was the host at the meeting. The Rev. K. J. Spurlock was chairman.

Father Bernard Sause, O.S.B., St. Benedict's College, Atchison, spoke on "The Decree of the Holy Office of 1937 Regarding The Marriage Cases *'In Favorem Fidei'.*" Rev. K. J. Spurlock, J.C.L., made a report on "Recent Responses of the Commission for the Interpretation of the Code."

THE RICCOBONO SEMINAR OF ROMAN LAW IN AMERICA

I. (a) Date: October 4, 1944

(b) Title: Late Roman and Early Visigothic Features in the Law of Property.

(c) Author: Dr. Ernst Levy, *Magister* of the Seminar for the current year.

(d) Abstract: Dr. Levy discussed the attitude of pre-Justinian legislation and literature toward such basic concepts as possession, ownership, usufruct and perpetual lease; he noted the difference between this attitude and that of the classical law and the resemblances between it and that of Germanic, Hellenistic and early Roman law. Passing to the Visigothic Codes of Euric and Levoigild, he considered additional changes in the concepts, particularly in regard to the existence and legal protection of real rights and to social restrictions upon ownership. He closed with a brief appraisal of Justinian's reaction to these post-classical developments.

II. (a) Date: November 9, 1924.

(b) Title: Justinian's Prohibition of Commentaries on the Digest.

(c) Author: Dr. Adolph Berger.

(d) Abstract: Dr. Berger gave a precise analysis of the texts referring to Justinian's ban on commentaries to the Digest and inferred, against the widespread assumption, that the ban regarded only the Digest and not the other parts of Justinian's codification.

III. (a) Date: December 15, 1944.

(b) Title: The Roman Law of Fisheries.

(c) Author: Dr. Richard A. Kahn.

(d) Abstract: The Roman Law of fisheries is private law, referring, with very few exceptions, to the protection of fishing rights and the ownership of fish. Fishing was free, under reasonable use, in ports, on the banks of streams, and on the coast line. *Interdicts* of the pretor prohibited interference with these rights. Some special situations, as minimum distances of fishing stations on coast lines and the enforced cooperation of neighboring fishermen, were regulated in later Constitutions of Emperor Leo. Diocletian issued an Edict of Maximum Prices, which included prices for fish, similar to present OPA ceiling prices.